Case and Comment

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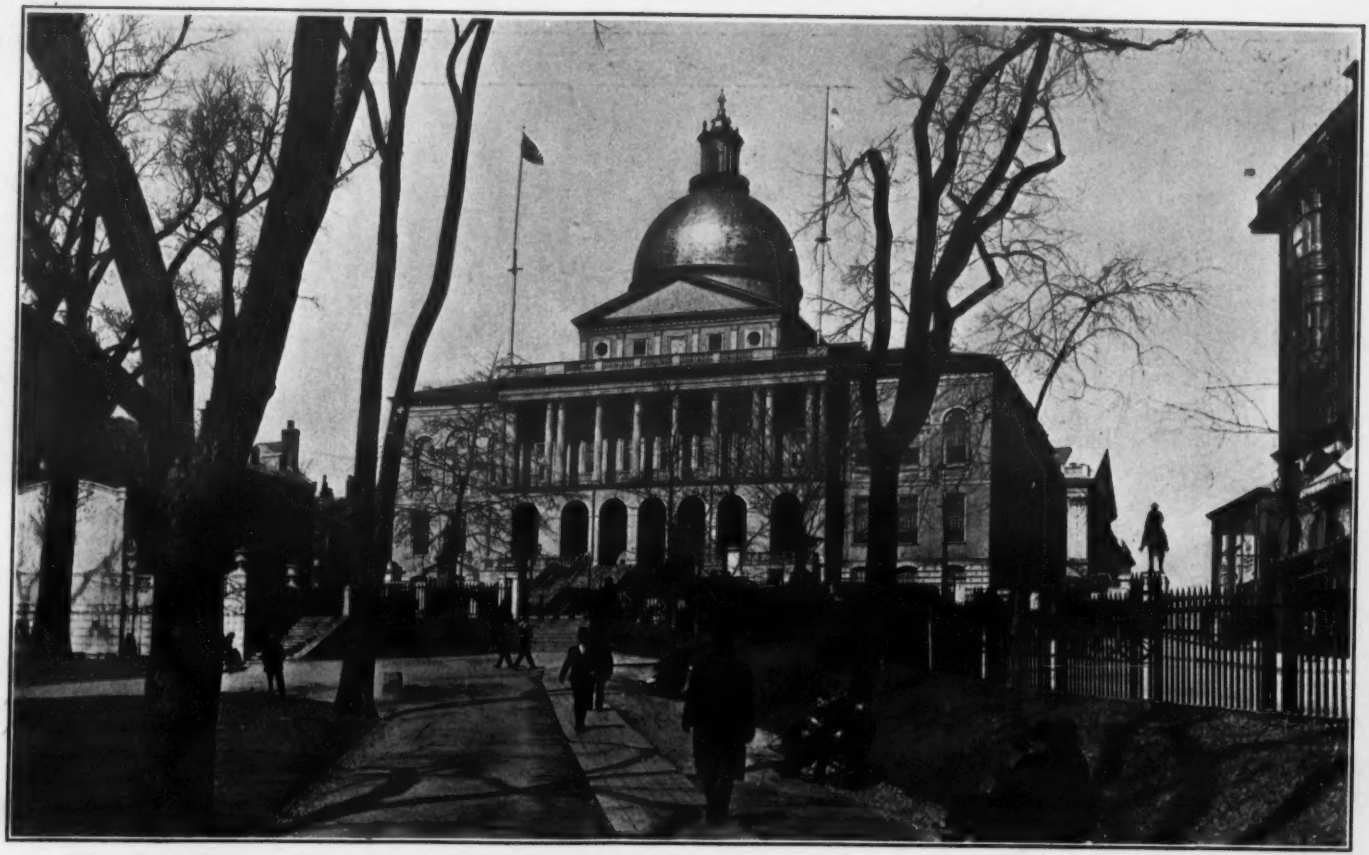
The Problem of Human Government

"A government of laws and not of men." This expresses the fundamental difference between the government of this great American Republic and all other systems of government ever devised by man.

And the problem of human government has existed throughout all the ages since mankind first started out upon the great highway of life. The greatest problem men have ever been called upon to solve is how they might live together in communities "without cutting each others' throats."

As we look at the warring world to-day, we are reminded that the history of the world is a long, sad story of war and bloodshed and death; that the path which humanity has traveled stretches back into the dim distance, a long, gleaming line of white human bones; that the flowers and the trees and shrubs along the way have been nurtured by the red blood that flowed from human hearts. All over the world the battle has waged; away down in Egypt where the Nile scatters her riches; upon the banks of the Tiber, which for centuries reflected the majesty of Rome; upon the heights above the castle-crowned Rhine; on the banks of the peaceful Thames; and upon the prairies that sweep back from the Father of Waters men have fought and died. In the field and in the forest, by the sweet running brook, and upon the burning sands, in the mountain pass and in the stony streets of the populous city; within the chancel rail of holy churches and at the dark entrance to the Bastile—in all these places, and in a thousand more, the hand of the oppressed has been lifted against the oppressor, the right that God gave to men to be free has struggled with the power which might has given, and, alas, so often might has triumphed, and the slave, sick at heart, has been scourged to his dungeon. On a thousand hillsides burning fagots have consumed men who dared to dream of freedom, and in dark and slimy prison cells where God's sunlight seldom entered, men have rotted with clanking chains upon their limbs, because they dared to ask for the rights of freemen. In the olden days force ruled the world; the King, the crown, the scepter were the insignia of power. All about were the instruments of force,—the cannon, the moated castle, the marching armies of the King.

And so it was until a new nation was born, a nation founded by exiles who were fleeing from oppression, from unrestrained power; exiles who dreamed of establishing a nation—exiles with the hearts and the hands with which to build it—a nation where there would be no masters and no slaves, where the citizen would rule and not the soldier, where the home and school, and not the castle, would stand as the citadel of the nation; where the steel would at last be molded into plowshares and not into swords; where, instead of martial music, the song of the plowboy and the hum of the spinning wheel would greet the ear; where lust for power would be dethroned and brute force strangled; where love would rule and not brutality; where justice, and not vengeance, would be the end of judicial investigation; where the rights of men to live and to enjoy the fruits of their labor would be recognized. This was the dream of the fathers of the Republic as they laid the foundation in the long ago.—Hon. Martin J. Wade.



STATE HOUSE, TAKEN FROM COMMON, BOSTON, MASS.

Case and Comment

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Some Problems of Legal Ethics

BY THOMAS PATTERSON, A.M., LL.B.

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AS THE law is a science which deals principally with ethical questions, so the ethical relations of its practitioners towards the courts, each other, and the public have always been regarded as of paramount importance. With this object in view, there have been not only many discussions of the broad subject of the lawyer's duties and obligations by those who have thus sought to discharge, in part at least, the duty which each of us owes to his profession, but various organized bodies of the bar have sought to put into the form of rules and canons some sort of code upon the subject, to which the young lawyer might refer his doubtful questions.

It is, of course, obvious that any attempt to codify the rules governing the lawyers must be very inadequate. The simpler, well-recognized rules can, of course, be stated, and the general principles which should guide his conduct can be at least outlined. But the difficulty with rules intended only to cover the most apparent professional duties is that they may be taken, ignorantly or purposely, as containing the last word upon the whole subject of professional duties. I am reminded, in this connection, of the Tennessee lawyer who is a character in one of Charles Egbert Craddock's stories, whose conscience was fully expressed in the Penal Code of the state of Tennessee and whose estimate of sin was entirely in proportion to the penalties affixed by that Code to various offenses. Manifestly, any such view of a code of legal ethics is not to be encouraged.

It is also clear, upon consideration, that any statement of a general duty or rule of conduct cannot always be followed. The duties of our profession are too complicated, the circumstances with which we find ourselves confronted too involved and refined, to permit a simply stated rule to meet adequately all situations.

Take, for example, the fifteenth canon of the American Bar Association. Under the head of "How Far a Lawyer May Go in Supporting a Client's Cause," we find the following language in the third paragraph:

> In the judicial forum the client is entitled to the benefit of any and every remedy and defense that is authorized by the law of the land, and he may expect his lawyer to assert every such remedy or defense.

I do not mean to criticize at all the language of the canon. It is probably

as fair a statement of the general rule as could be devised. But let us see, for a moment, whether it can be depended upon as of universal application.

The Statute of Limitations is a statute of repose, wisely intended to prevent the assertion of stale claims where years may have caused the memory to become inaccurate, and the evidence of the transaction may no longer be available. Since it had to apply to all cases, it could make no distinction between the disputed claim and the admitted claim.

Now assume that a client comes to you with an admission that he owes the claim, that he has secured indulgence and delay by appeals to the clemency of his creditor, such appeals always stopping short of such promise of payment as would toll the statute, and he has now succeeded in his purpose of having "the law pay his debt." It is not difficult to imagine details of this transaction that would present a picture so repulsive that no lawyer of conscience would identify himself with a client of such distorted ethical views. For, after all, the lawyer is the client when he appears for him in court, and no reasoning can justify him in making his own a case which shocks his moral sense.

Let me illustrate further by a case which actually occurred in my professional experience a number of years ago. In the state in which I am a practitioner the rule used to be that a deed, absolute on its face, could be shown to be a mortgage by parol evidence which should be "clear, precise, and indubitable." Many cases went to the appellate court, in which the character of the evidence was discussed, sometimes held to be sufficient, sometimes insufficient. The legislature, in its wisdom, decided to make an end of this entire class of controversies and to that end passed an act that no deed, absolute on its face, could be shown to be a mortgage, unless there was executed and acknowledged with it a formal defeasance, which, to be valid, must be recorded within a certain number of days of its date. The purpose of the act is apparent and I do not mean to question its wisdom for the general end it had in view.

An old farmer had a fine, well-stocked farm, out of which, by constant industry, he made a good living for himself and his family. It came to pass that he needed some money, perhaps for a new barn or improved machinery. At all events he wished to borrow $700. He had absolutely no business experience, so he inquired of his neighbors how a man wanting to borrow money might go about it, and by them was referred to a mortgage broker. The mortgage broker proved quite accommodating, as he might well be, for the farm was worth many times the amount of the loan. He explained, however, to my farmer friend that he would not use the ordinary mortgage form, but would put the transaction in a much simpler shape. The farmer would make to him, the lender, a straight deed for his farm, for a nominal consideration, and the lender would give him back a paper, duly acknowledged, setting forth that the deed was really a pledge of the property for the debt, and that upon its payment, with interest at 6 per cent, the lender would reconvey the property by good and sufficient deed of conveyance. The transaction was so closed. It was all very simple. Reading over the terms of defeasance, the farmer saw the whole matter clearly set out. There was no possibility of a misunderstanding. So he peacefully put away the paper in a safe place and applied himself to the tillage of his farm. Before the debt was due, he found himself in funds to repay it and so betook himself to the mortgage broker, with the principal and interest of his debt, to get back his farm out of pledge. To his horror he was told that the farm now belonged absolutely to the broker, because the farmer had neglected the little formality of recording the defeasance within the time set by the statute, and it was no longer worth the paper on which it was written. He had fallen into the trap which it was intended he should fall into.

It was a very frightened old man who came to me with this story. He was so dazed that it was with difficulty I could explain to him the toils in which he was involved. When he did understand his position, in spite of my assurances that the Supreme Court would make some new law to fit his case, he hurried off to

the counsel for the mortgage broker and made his own settlement. I do not know what he had to pay as usury and attorneys' fees to get back his farm. Perhaps he was wise to take the shortest way out of the difficulty. I have always believed that, in spite of prior decisions, the Supreme Court would have relieved against so obvious an iniquity. But aside from the legalities of the case, how would your conscience feel in being partner in the spoils riven from an old, an ignorant, and an unsuspecting man? I can hear the answer before it is given—"Thy money perish with thee."

A somewhat similar situation sometimes occurs, not frequently, but often enough to attract attention. A man or men in a fiduciary relation towards an association or an estate will, by methods perhaps purporting to be legal, perhaps not even presenting the face of legality, appropriate the funds of the trust. When restitution is sought, the despoilers are found surrounded by legal talent who oppose their best efforts to the admitted claims of justice, seeking by every technical objection, by every finespun line of argument, to so obstruct the pursuit that the pursuers may be worn out, as it were, by a process of attrition, and the looters allowed to retain a not inconsiderable portion of their loot as the basis of compromise.

These are only some of the illustrations of what is meant by the "perversion of the law." I submit that more resentment has been caused by this species of professional action, where an evident wrong—an injustice—either committed in the past or sought to be committed in the future is protected or furthered by the dry husk of the law, than by all the badly decided cases which have been fairly threshed out before the courts, that have appeared on the records since records began. No one asks of a lawyer that he shall be the *custos morum* of his state or his community. The legislature is the final judge of the sound public policy of nation and state; and the local assemblies or councils of the matters of policy which the higher authority has committed to them. The lawyer may or may not approve of the policy represented by a particular act of the legislature. It is a matter of entire indifference what his mental attitude is towards the act in question. A lawyer is a minister of the law, not a creator of it. His very oath of office requires of him fidelity and obedience to the established law. What applies to an act of the legislature applies practically to a settled rule of policy adopted by the courts, although in the latter case he may feel free to call the attention of the courts to the wisdom or authority of the particular rule. Having then ascertained the rule of law applicable to his case, it is the business of the lawyer to see to what extent his facts come within it and his case is governed by it.

In all the myriad forms that legal questions take, such as the exact statement of the rule of law, the composition of disputes between conflicting authorities, the construction of the terms of a statute, the application of rule of law, once settled, to the facts of the case, the advocate acts for his client in the fullest sense of the word. He endeavors to put forward every argument and consideration for the winning of his case that his client could put forward if he had the professional training. It is altogether desirable that he should do this. It is out of the earnest contention of the bar that the court can fairly determine the cause. If advocates were judges, each seeking the best and strongest form in which to state his adversary's case, the task of judicial determination would be much more difficult than it is at present. And, I take it, an advocate may present an argument which is not persuasive to his own mind, so long as he does it fairly; for our minds approach problems from different points of view, and no man can say that his conception of the case is the only one to be entertained. The strong, clean-fought battle upon both sides is just as much a necessary element of the right decision of the matter as is the impartial, fair, judicial mind which examines, selects, and rejects until it has demonstrated its conclusion.

In like manner with the facts of the case. An advocate has no right to prejudge these adversely to his client, any more than he is allowed to prejudge them favorably to his client. Our system has

raised up a tribunal for the express purpose of determining disputed questions of fact, and for no other purpose. Every advocate has been surprised more than once by his misconception of the facts both for and against his client until they are fully winnowed out by the examination and cross-examination that make up our trial procedure. Therefore, unless he has some secret evidence of the falsity of his client's story, and so long as he presents the evidence for his client fairly, it is his right and duty to permit the jury to determine where the truth lies. All this is a part of our system by which justice is obtained out of controversy.

Where, as I look at it, the line must be drawn, is where the lawyer is asked to use the law for a purpose entirely foreign to its object, a purpose which the legislature which made the law or the courts which laid down the rule would at once have rejected, had they perceived the proposed result, as one which they would have excluded from their term had they been able to so frame a general rule as to provide for the exception. The instances I have given above will perhaps illustrate my meaning. If I may state it simply, it would be something like this: A lawyer may use all rules of law for the benefit of his client, to secure to him the results which the law has meant to give him; he may not pervert the rules of law to secure to his client results which he is perfectly aware that those rules never contemplated, and which results are so opposed to his moral sense that he would never, for a moment, think of claiming them himself. When brought face to face with results such as I have mentioned above, he cannot devest himself of the fact that he is his client's keeper.

There is another ethical field somewhat broader than that which we have been discussing, quite outside any canons of ethics, and dealing perhaps more with a lawyer's duty as a citizen than his strictly professional character.

The last quarter of a century has seen many changes in many fields of the law. The right of the workman to compensation for injury received as a part of the industrial operation of railroad or plant, the right of small business to compete on even terms with large business, the prohibition of unfair competition, have rewritten the law as it was known to the older lawyer. These results have been accomplished not by professional, but by popular, thought and activity.

To find an illustration so far removed from the present field of reform activities as to permit of candid review, let us turn for a moment to the English land laws at a time when the religious houses of England were gradually but surely drawing into ownership the fertile acres of that little island. The tenants and farmers who toiled upon these acres were but the serfs of their masters. And the great grievance was that once a farmstead passed into the dead hand of the corporation, it never escaped. To remedy this evil the Parliament of England passed the Statutes of Mortmain. To prevent the will of the Parliament from being accomplished, the lawyers of England invented the "conveyance to the use." To countercheck the device, the Parliament passed the Statute of Uses. And so on through many turnings the people of England pursued their quarry, and the lawyers of England fought repeated rear-guard actions to save the quarry from pursuit. . . . .

I had almost said at the close of this little story, *"nomine mutato, de te fabula narratur,"* but that would not be just or fair. I do not think it can fairly be said of the lawyers of to-day that, as a class, they have tried to hinder or delay. The most that can be said of us is that we have failed to originate much of what has been accomplished. . . .

No canons of ethics, no writer on professional duties, can ever hope to successfully define, cover, and solve the ethical questions which hang about our profession. The only safe guide which the younger man may adopt, and the older man may cultivate, is that simple voice of conscience that speaks always its own advice when difficulty arises, to take that course, to use those methods, which, were the conditions reversed, we could justly demand should be applied to us by our adversary.

Church and State in Time of War

BY A. L. GILLIOM

Of the South Bend (Ind.) Bar

THERE seems to be some confusion at present on the question of the exact relation between Church and State in this country. In time of peace, the civil power of the State seldom comes in conflict with the claims of the Church, and when it does, it is usually invoked only by an individual or individuals to settle private differences which have their origin in ecclesiastical matters, and which involve infringement of civil or property rights. But in time of war, the military power of the State, when exercised for drafting citizens into military service, comes in open and direct conflict with the claims to exemption from such service by a no inconsiderable number of ecclesiastics.

Religious sects claiming such exemption for their members of military age base their claims on religious convictions which rest on their interpretation of the Scriptures. Some sects even extend this claim in respect to noncombatant military service. They seek to make these claims binding on the State by virtue of constitutional provisions respecting religious freedom.

A consideration of the laws applicable is of interest. When the Federal government was formed, the states delegated to it, by constitutional provisions, certain powers which they had theretofore exercised themselves. Thus, the powers to conduct a foreign policy, to declare war, and to raise and support armies and to maintain a navy, and the power to make all laws necessary and proper for carrying into execution the foregoing powers, were expressly delegated to the Federal government.[1]

These powers were not delegated subject to the provisions in state constitutions respecting religious freedom, but they were lodged in the Federal government through its Constitution, in clear and express language and in plenary measure. The establishment of an adequate common defense was one of the principal objects of the original states in forming a national government. Whenever the war powers of the Federal government come into question, the Supreme Court is inclined to construe them liberally. Thus, in Tarble's Case, 13 Wall. 397, 408, 20 L. ed. 597, 601, the court said:

> Among the powers assigned to the national government is the power to raise and support armies and the power to provide for the government and regulation of the land and naval forces. The execution of these powers falls within the line of its duties; and its control over the subject is plenary and exclusive. It can determine, without question from any state authority, how the armies shall be raised, —whether by voluntary enlistment or forced draft.

When the Federal Constitution was adopted in 1787, there was not so much as a single syllable inserted on the subject of religious freedom. Not until later, when an Amendment was adopted, was there any mention in our United States Constitution of religious freedom. This Amendment is part of § 25 of article 1 of the first articles in amendment of the Constitution. It reads as follows:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof.

This inhibition on Congress cannot be taken in any way in derogation of the war powers previously granted to that body. The principle that our Federal government may, in the exercise of its military power, draft its citizens into military service against their will, is well established. When Congress passed the Selective Draft Law, approved May

[1] U. S. Const. art. 1, § 8, and art. 2, § 12.

18th, 1917, it did not exercise its power in full on that subject of legislation. It made provision in § 4 of the act for the exemption from combatant service of religious objectors, in the following language:

> And nothing in this act contained shall be construed to require or compel any person to serve in any force herein provided for who is found to be a member of any well-recognized religious sect or organization at present organized and existing, and whose existing creed or principles forbid its members to participate in war in any form, and whose religious convictions are against war or participation therein in accordance with the creed or principles of said religious organization.

The President, as Commander-in-Chief of the Army, does not have the power to order a citizen so exempted to perform combatant service. The exemption thus provided for may be claimed as a matter of right under this statute by such as fall within the class specified. But the same section also makes the following provision:

> But no person so exempted shall be exempted from service in any capacity that the President shall declare to be noncombatant.

There are some religious sects that are challenging the right of the President to order them to do noncombatant service under the above provision of law, and they also maintain that the constitutional provisions respecting religious freedom are a bar to the power of Congress to require any kind of military service of them, because their religious convictions are against such acts. In time of the Civil War, religious objectors could escape the draft by paying a sum of money or by hiring a substitute. But under the present law that is expressly prohibited. It may well be that before this war ends the Supreme Court will be called upon to decide whether the Federal government has the power to impress religious objectors into military service, or whether, granting that such power exists, religious belief or conviction is justification for violating such a law, properly enacted.

There can be no doubt that such a law is constitutional, or that the Supreme Court would sustain it. Nor can there be much doubt that the court would find against a religious objector who knowingly would refuse to perform the military service required of him under such law. Once such claims to exemption were allowed as a matter of right under the Constitution of the United States, the door would be wide open for the entire citizenship of our country to escape military liability through the simple medium of a questionable membership in a church opposed to military service, and our country would be helpless, and the principal object of forming a national government would be frustrated and defeated.

While the Supreme Court has never been called upon to decide the precise question of whether religious belief or conviction would justify the violation of a draft law properly enacted, it has given decisions which are illuminating. In the case of Reynolds v. United States, 98 U. S. 145, 25 L. ed. 244, the court sustained an act of Congress making polygamy a crime in United States territory, and also upheld a conviction thereunder. It was held that the Amendment already referred to was not a bar to Congress to pass the law in question, and also held that religious belief that the law was wrong did not justify a violation thereof. The court said:

> Congress was deprived (by the Amendment) of all legislative power over mere opinion, *but was left free to reach actions which were in violation of social duties, or subversive of good order.*

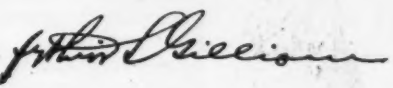
So, too, where an ecclesiastical controversy results in an invasion of civil or property rights of a citizen, though he, too, be a member of the same church to which the aggressor belongs, secular courts will offer relief, and it is no defense that the controversy has an ecclesiastical aspect.[2]

One fact is firmly established by these decisions, and that is, that membership in a church of whatever creed or profession, does not exempt such persons from obligations under laws passed in

[2] Bouldin v. Alexander, 15 Wall. 139, 21 L. ed. 71; Schweiker v. Husser, 146 Ill. 399, 34 N. E. 1022; Gray v. Christian Soc. 137 Mass. 329, 50 Am. Rep. 310; Jones v. State, 28 Neb. 495, 44 N. W. 658, 7 L.R.A. 325; West Koshkonong Congregation v. Ottesen, 80 Wis. 62, 49 N. W. 24. Also see notes in 15 L.R.A. 801; 49 L.R.A. 353; and 4 L.R.A.(N.S.) 1155.

the exercise of the civil power of the State. If religious belief or conviction does not exempt from civil obligation, how can it be said that it exempts from the higher and more important obligation,—namely, military obligation?

Upon a consideration of the authorities and the principles involved, there can be no doubt that the proper construction to be given the Amendment to our Federal Constitution relating to religious freedom is that the freedom there contemplated and guaranteed pertains strictly to religious opinion and to religious worship, and does not guarantee immunity for actions based on religious belief and conviction which are "in violation of social duties or subversive of good order." In other words, the freedom guaranteed relates wholly to the relationship between man and his God, and not to the secular relations between citizens of a temporal government, or to the relationship between a citizen and his temporal government Religious belief does not, of course, abridge civil or military rights, and it seems there cannot be reasonable opposition on any plausible theory to the converse conclusion that religious belief or conviction does not relieve of civil or military obligation.



The Decision

What a moment of suspense
When the lawyer's nerves are tense
And his case is tried,
When the trial magistrate,
Grim and solemn and sedate,
Pauses to decide!

Till the judge shall break the spell
Vain it is for one to tell
What the court may do!
Toward the judge the lawyers glance,
For a forecast in advance
Of his Honor's view.

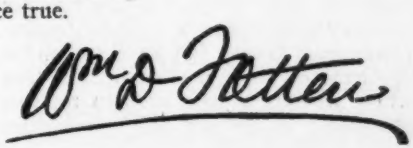
Every moment seems as ten
While the legal gentlemen
Patiently await
For the wished and final word,
Full of wisdom or absurd,—
For the client's fate.

When the judgment or decree
Means for one a handsome fee,
And a client's praise,
He declares his case was won
Through a righteous Solomon
Of judicial ways.

And the losing lawyer swears
His poor client badly fares,
Finding fault and flaw
Oozing forth from every line,
Where judicial light should shine
In a court of law.

But the judge his best has done
Favoring not anyone,
Mindful of his oath;
And regrets that he could not
Find a happy landing spot
For the lawyers both.

There it is with human kind
Much depends upon the mind,
And the point of view
What to one seems gravely wrong
Fills another's heart with song
Seems to Justice true.



The "Tools of Democracy"

A Brief Summary of the Existing Legal Status of, and the Actual Experience with, the Initiative, Referendum, and Recall in the United States

BY EDWIN S. POTTER

Associate Editor of Equity

THERE can be no dissent, in view of our government's present great adventure in world reorganization, from the statement that democracy is the goal toward which our social and political effort as a nation is directed. Conservative or liberal, lawyer or layman, all alike stand committed to this ideal for which the whole material resource of the nation is now enlisted in a war to "make the world safe for democracy."

It is when we come, however, to the problem of putting democracy into practice that we find a divergence of interests and opinions. And under these circumstances, all thoughtful and conscientious citizens are more than ever concerned that our own governmental practice should be truly democratic. Governor McCall of Massachusetts said to the constitutional convention at Boston, last June:

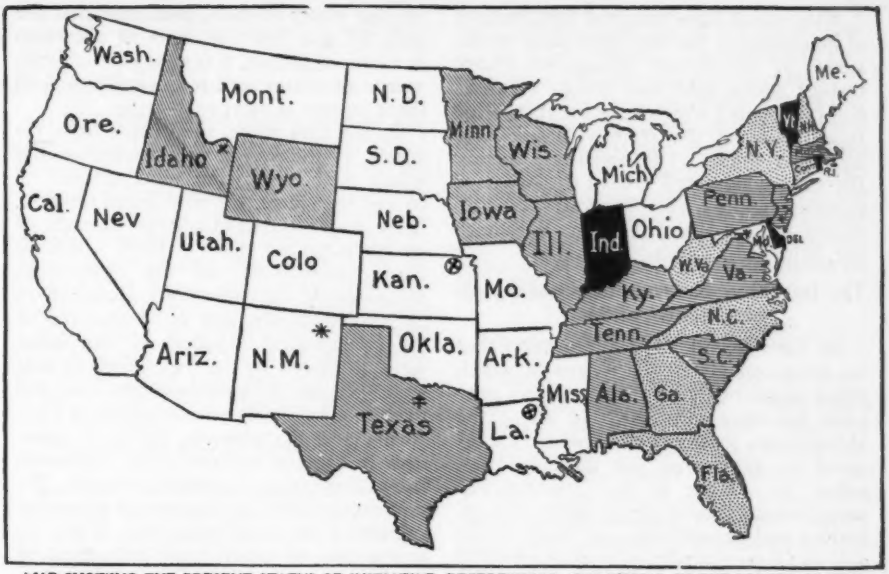
> Democracy will come into its own, not when the world is made safe for it, but when it has made itself safe for the world. It can be made safe by endowing it with the necessary organs. . . . Without appropriate organs it would be, as it has so often been, the easy prey of organized privilege; it would tumble about itself and be as helpless with all its strength as the blind Polyphemus.

Doubtless it will come somewhat as a shock to many of the conservative but worthy members of the legal profession, preoccupied as they may have been in the problems of their professional careers, when the fact is here brought to their attention that the old and conservative state over which Governor McCall presides is pretty certain to adopt the statewide initiative and referendum within the next year or two; as such a measure on November 15, after months of debate in the war-time constitutional convention, passed its third reading, by a vote of 165 to 111.

Possibly some busy citizens will be equally surprised to learn that when Massachusetts takes this important step, she will be the twenty-third state to have supplemented its system of representative government with one or more of these instruments of direct popular control *for state-wide use;* namely, the initiative or referendum as applied to statutory or constitutional law and the recall as applied to public officials.

Besides this very large area of the state-wide initiative, referendum, and recall, it is a fact that one or more of these instruments, *as applied to municipalities,* has been authorized or required by general or special laws or by constitutional amendments *in forty-four states of the Union.* The four states which have so far no recognition of these instruments in any shape or form, as indicated in black on the accompanying map, are Vermont, Delaware, Rhode Island, and Indiana.

Of these four states, three are among the original thirteen and have very old Constitutions, and one (Indiana) was admitted to the Union in 1816. Indiana's first Constitution had no provision for separate amendments, and its mandatory submission of a convention proposition every twelve years was on the plan of a majority of all votes cast at a general election. The present Constitution (adopted in 1851) abandoned this con-



MAP SHOWING THE PRESENT STATUS OF INITIATIVE, REFERENDUM, AND RECALL IN THE UNITED STATES

- 22 States having constitutional provisions for the State-wide I. R. or R. and provisions for the municipal I. R. or R. in Constitution or general laws or in both.
- 15 Other States having general laws for the municipal I. R. or R., but not the State-wide Initiative, Referendum or Recall.
- 7 States having only special laws for the municipal I. R. or R.—*i. e.*, by special act for particular city or cities.
- 4 States having no laws or constitutional provisions whatever for the I. R. or R.

- X An I. and R. amendment was adopted by the voters of Idaho in 1912, but was not self-executing.
- ✳ New Mexico and Maryland have the State-wide Referendum, but not the State-wide Initiative and Recall.
- ⊗ Kansas and Louisiana have the State-wide Recall, but not the State-wide Initiative and Referendum.
- ‡ Many Texas cities have adopted the I. R. or R. under the Home Rule amendment of 1912.

vention submission plan and substituted a more difficult method. This was to permit separate amendments, but to require that while one or more amendments are awaiting the action of a second legislature or of the people, no new amendment may be proposed; also that the adoption of any amendment by the voters must be by a majority of all the votes cast at a general election.

There are at present twenty-two states which have incorporated one or more of these "tools of democracy" in their fundamental law for state-wide use. As may be seen by reference to the accompanying map of the United States, there are now eighteen states which have adopted the state-wide initiative and referendum, in their order of adoption, as follows: South Dakota, Oregon, Nevada, Montana, Oklahoma, Maine, Missouri, Michigan, Arkansas, Colorado, Arizona, California, Ohio, Nebraska, Washington, North Dakota, Mississippi, Utah.

Two other states, New Mexico and Maryland, have adopted the state-wide referendum, but not the state-wide initiative or recall.

Idaho and Utah both adopted initiative and referendum amendments without a self-enacting clause, Utah in 1900 and Idaho in 1912. Not until this year (1917) did the legislature of Utah carry out the purpose of the amendment by enacting an initiative and referendum statute. Though Idaho has not yet done likewise, that state might properly be included in a list of those which have at the polls adopted these instruments. But Idaho does not yet have them in actual use.

Nine states have adopted constitutional amendments for the state-wide recall, seven of which are among the above twenty states, and two others (Kansas and Louisiana) which have the state-wide recall, but not the state-wide initiative and referendum. The nine states having the state-wide recall are, in the order of adoption, as follows: Oregon, Colorado, Arizona, California, Nevada, Washington, Michigan, Kansas, Louisiana.

The Initiative, Referendum, and Recall in Municipalities.

So far it should be kept in mind that we have considered the extent to which these instruments of direct control now exist for state-wide use. In all of the above states these powers are also recognized or authorized for municipalities, either by statute or by constitutional amendment. The states in which the initiative and referendum are made available to all municipalities by constitutional amendment are as follows: South Dakota, Oregon, Ohio, Oklahoma, Maine, Nevada, Colorado, California, Arizona.

There are now fifteen other states in which *general* laws have been passed authorizing municipalities of one or more classes to avail themselves of the initiative, referendum, or recall, and generally in connection with the commission, commission manager, or other concentrated forms of government, as follows: Alabama, Idaho, Illinois, Iowa, Kentucky, Massachusetts, Minnesota, New Jersey, Pennsylvania, South Carolina, Tennessee, Texas, Virginia, Wisconsin, Wyoming.

The legislatures of seven states, in addition to those above mentioned, have enacted *special laws* for one or more municipalities, granting special charters in which provision is made for the initiative, referendum, or recall. These are: Florida, Georgia, Connecticut, New Hampshire, New York, North Carolina, West Virginia.

The Conservative Use of the Powers of Popular Control.

Taking into consideration this extensive statutory and constitutional provision for the state-wide and municipal initiative, referendum, and recall in forty-four states of the Union, and that the bulk of this law has been in operation for over a decade, a review of the experience of states and municipalities with these powers is most reassuring.

In the first place, the people have resorted to these reserved powers on the whole with surprising moderation. In two of the states, California and Oregon, there were relatively a large number of measures on the ballot in 1914. In California twenty-one of the forty-eight measures on the ballot were placed there by the legislature, and in Oregon ten of the twenty-nine measures on the ballot were so placed by the legislature of that state. But it is significant that even the twenty-seven initiated measures in California and the nineteen initiated measures in Oregon represented a maximum use of this power at a single election. We find that in 1916 the number of measures submitted in California had fallen to seven, two of which were submitted by the legislature; and in Oregon the number on the ballot had fallen to eleven, of which the legislature had submitted three.

As to the results of the voting, even in 1912 and 1914 when the number of measures was greatest, it has been shown by an analysis of the returns that the voters displayed discrimination at least. Speaking particularly of the 1914 elections, when a total of one hundred and ten initiative and referendum measures were submitted in fourteen states, Robert E. Cushing, an expert investigator, writing in the *New Republic* magazine, rendered the following opinion:

> The popular voting on measures last November cannot be called unintelligent. A scanning of the vote on separate measures discloses an almost total absence of that tendency to treat all propositions alike, which betrays an indifferent ignorance. The more exacting the task imposed upon the people, the more painstakingly and discreetly did they perform it. . . . Whether the voter's judgment was good or bad, he justified the referendum ballot by using it to give himself precisely what he wanted.

And the same magazine made the following editorial comment:

> The conclusive argument in favor of direct government is consequently educational. . . . A democracy is not educated up to the level of its responsibilities by decisions made by its representatives or by principles of "legal mor-

als" established by its forbears, or by the power of vetoing unjust legislation conferred on judges. . . . If a political democracy is to learn its business it must participate directly in the transaction of its business.

It is also important for the judicial and scientific-minded student of government to bear in mind that in several of the initiative and referendum states the voters at the polls have refused to sanction a proposed surrender of these powers of direct control; also that in no state or municipality has a serious and open attempt ever been made to destroy these powers. But in a few instances where covert or indirect attacks on this system have been made, the voters by large majorities have repulsed such attacks.

State-wide Recall Never Used.

As to the use of the recall, the fears of the conservative-minded have proved, in all this body of both state and municipal experience, to have been not warranted. The people are more slow to use this power than some prophets anticipated, and it is a fact that thus far *the state-wide recall has never yet been put into actual use.* In municipalities the recall has been used far less frequently than either the initiative or the referendum.

The extent of the use of the state-wide initiative and referendum can be found by consulting the January issues of Equity, which for several years have presented tabulations of the state election result.[1] The latest and most complete and authoritative assembling of the experience of municipalities with these "tools of democracy" was presented in the special issue of Equity for October, 1916.[2]

From a compilation of the reports there given, in reply to the questionnaire sent out by Equity, it was shown that of the 258 municipalities heard from, only 138 had ever used any of the three powers of direct control. The initiative had been used 128 times, the referendum 103 times, and the recall 59 times. Some few cities had used these powers several times, but the larger number had used them not at all. The reports in a large number of cases, however, disclosed the starting of proceedings to use one or another of the direct powers and that this effort exercised a steadying influence on the governing officials.

Radical Measures Voted Down.

Finally, no presentation of our experience with the initiative, referendum, and recall would be adequate which did not refer to the character of the decisions rendered by the voters. According to the *a priori* warnings of many conservative leaders in this country, these instruments were sure to result in a mass of radical legislation and in general to what was conveniently designated as "mob rule." Has our experience borne out this baleful forecast?

Without fear of successful contradiction, the record answers emphatically, "No!"

It is quite true that various groups of our radical citizens have been able, by these means, to bring their proposals up to the "court of last resort,"—the electorate. But invariably the radical measures have been voted down,—such, for instance, as the universal eight-hour day in California and Washington, the single tax in several western states, etc. In Missouri the Full Crew Law enacted by a labor-controlled legislature was repealed when submitted to the voters by means of the referendum.

Thus the radicals may be said to have had their "day in court," and the slower-moving general public has rendered its more conservative verdict. In the same way various progressive measures, such for instance as proportional representation, the one-chambered legislature, public ownership of public utilities, etc., have been rejected by the voters. But the opportunity thus to bring these questions before the people has been useful in educating the public as to their merits but

[1] Another and very recent and reliable source for this information is an article by Mr. Judson King, entitled "The State-wide Initiative and Referendum," which was published last March by the United States Senate as Document No. 736.

[2] Copies of the October, 1916, Equity, containing 151 pages devoted to original reports of municipal officials and others, will be supplied on request to readers of CASE AND COMMENT at the nominal charge of 10 cents a copy, postpaid.

there is nothing to prevent the voters from raising these issues again.

Nevertheless a great body of important and useful legislation and constitutional amendment has been obtained in many states by means of the initiative, and a considerable number of bad laws enacted by state or municipal legislative bodies have been held up and killed by the voters through the referendum.

Petition Basis of the Initiative, Referendum, and Recall.

There is, naturally enough, considerable variation in the different states as to the conditions under which the initiative, referendum, or recall is made operative. For a complete tabulation of the whole movement, with the number or percentage of petition signers required to make the instruments of popular control operative, the reader is referred to the July, 1917 Equity ((pp. 132 and 133). Space at my disposal here does not permit a detailed statement.

Certain generalizations, however, may be made that will be useful for the student of this subject. One of these is that the proportionate number of voters' signatures required on petitions to invoke these powers is lower for state-wide use than for municipal use; also that the proportionate number so required is lower for large cities than for small ones. The reason for this is the very practical one that the larger the political division, the greater the physical difficulty and expense of bringing any proposition to the personal attention of the larger number of voters.

Another generalization is that in a large majority of states the plan first adopted by South Dakota in 1898 and by Oregon in 1902 has been followed, namely, to make the petition basis a certain percentage of the total vote cast at the last preceding election. But in recent years the plan of having the petition basis a definite number of voters has grown in favor with the most thoughtful and experienced students of government. This plan for state-wide use has been adopted by Maine (10,000 for referendum and 12,000 for the initiative), by Maryland (10,000 for the referendum) and by Mississippi (6,000 for the referendum and 7,500 for the initiative). But in many other states the definite number plan has been adopted for cities.

For the state-wide statutory initiative and referendum South Dakota set the pattern of a 5 per cent petition. No constitutional initiative was adopted by that state. In Oregon the referendum was left at 5 per cent, but the initiative for both statutes and constitutional amendments was raised to 8 per cent. Most of the other initiative and referendum states have followed the example of Oregon, except that a few have unfortunately increased the petition basis for the constitutional initiative,—Nevada and Michigan to 10 per cent; Oklahoma, Arizona, and Nebraska to 15 per cent; and North Dakota to 25 per cent, thus making the constitutional initiative unnecessarily difficult, 25 per cent being practically impossible.

The petition basis for the state-wide recall has been generally 25 per cent, but is 12 per cent in California and 10 per cent in Kansas.

As for the petition basis of the initiative, referendum, and recall in municipalities, there is still wider variation. South Dakota by law in 1907 made the municipal initiative and referendum on the same footing as the state-wide, 5 per cent, but the municipal recall on a 15 per cent basis. Oregon placed the municipal referendum on a 10 per cent basis and the municipal initiative on 15 per cent, but the recall at 25 per cent. Again this Oregon plan has been the model most commonly used for municipalities. Still, so late as 1914, the large city of Buffalo, New York, adopted the referendum on a 5 per cent petition basis. Colorado by general law has the 5 per cent referendum in municipalities. The tendency is undoubtedly toward a lower petition basis as the public gains confidence from practice in the use of the "tools of democracy."

Edwin S. Potter.

The Law and the Facts

*BY AUBREY L. BROOKS**

President of the North Carolina Bar Association

TO THE busy lawyer this subject is the Alpha and Omega of his daily life. The task of applying the law to the facts of ever-differing cases and interpreting the facts in the light of changing laws is truly yours. I shall not presume in this presence to attempt to illumine that field.

Obedient to the admonition that the law is a jealous mistress, the bar, and nowhere more so than in North Carolina, has devoted its energies and talents to the study and practice of its precepts and principles as heretofore declared; assuming in the main that as to the law, whatever is, is right; and that as to the facts, the law should be applied blindly and faithfully. The profession, inspired and controlled by these restricted but high ideals, has produced great judges, advocates, and counselors, and many others less great. Do not misconceive my meaning. The labors to which I refer are highly honorable and absolutely essential to the administration of justice.

But I wish to emphasize the opinion that twentieth century enlightened justice does not require blind adherence to eighteenth century law, and that twentieth century facts are more important to the lawyer of to-day than eighteenth century law. Law is the direct result of existing facts. Facts are established by human society. Society is ever changing; hence there can never be a settled state of facts or unchanging laws. We all understand that it is essential to know the facts in order to apply the law, but have we fully realized that it is even more necessary to know the restless changes of society that produce the facts, in order to properly make the law and to intelligently interpret it?

The law has been defined as "a science consisting of the observations and classifications of human transactions."

Mr. Bryce in one of his illuminating essays says:

> The law of every country is the outcome and result of the economic and social conditions of that country, as well as the expression of its intellectual capacity for dealing with these conditions; the causes which modify the law are usually to be sought in changes which have passed upon economic and social phenomena. When new relations between men arise, or when the old relations begin to pass into new forms, law is called in to adjust them.

If we are to demonstrate an intellectual capacity for dealing with these changed conditions, we must break the fetters of ignorance, discard the tyranny of the *status quo*, and open-mindedly seek the truth of to-day as observed in the manifestations of life around about us. I wish to adopt with emphasis Emerson's views upon this subject in his essay on History. He says:

> I have no expectation that any man will read history aright who thinks that what was done in a remote age by men whose names have resounded far has any deeper sense than what he is doing to-day. There is no age or state of society, or mode of action in history, to which there is not somewhat corresponding in his life. History must be this or it is nothing; every law which the state enacts indicates a fact in human nature,—that is all. We must in ourselves see the necessary reason for every fact, see how it could and must be. All inquiry into antiquity is the desire to do away with this wild, savage, and preposterous then or there, and introduce in its place the here and now.

In the light of this admonition, I invite you to consider with me some of the twentieth century facts which our profession must understand if the law for which we are guardians shall give a faithful account of itself.

First of all, in a moment and in the

*Address before the North Carolina Bar Association at Asheville, N. C., July 3d, 1917.

twinkling of an eye we have ceased to be merely citizens of North Carolina, and have become citizens of the world. No longer are the affairs of the peoples across the seas of no concern to us, but their problems have become our problems, and their struggles have become our struggles. No longer are we engaged in academic debates as to whether the Constitution follows the flag, but Constitution or no Constitution, the American flag today floats from the Eiffel Tower over the Republic of France, and from the dome of Westminster Abbey over the Kingdom of England. Truly the prophecy of Edmund Burke is being fulfilled that, the daughter, America, with true Roman piety, is succoring her parent, England. Buckle, the English historian, said that the American Declaration of Independence was the greatest declaration of human rights ever proclaimed, and that it should be hung in the nursery of every king and blazoned upon the doorway of every monarch. In true American fashion, however, we have set in to abolish nurseries for kings and to bar the doorways of monarchs.

AUBREY L. BROOKS

We have become the creditor nation of the world. Its financial center is no longer to be found in London, Berlin, or Paris, but in New York. From a child in swaddling clothes we have grown in a century to be the mightiest giant of the earth, endowed with all the power that God has ever decreed to mortal man. In our evolution and progress we found it desirable to greatly increase our territorial possessions. Thomas Jefferson negotiated with Napoleon for the transfer of that undeveloped empire west of the Mississippi river, known as the "Louisiana Purchase." It then became necessary for our own self-protection to enlarge our horizon and field of influence, and to espouse and announce the Monroe Doctrine, which was a notice to all the world that we had extended our activities and protection to all the peoples of the Western continent to the south of us, against the encroachment of any foreign nation. To our national possessions we have since added Texas, New Mexico, Southern California, and Alaska on the continent, and to the islands of the sea we have gone in quest of Hawaii and the Philippines. With the acquisition of these distant possessions inhabitated by alien people, whether for weal or woe, we have assumed the Asiatic problem. Over Cuba, Porto Rico, and Haiti, we have established a protectorate. Very recently we have acquired by purchase the Danish West Indies. Resist or evade it as we may, the Mexican problem must be solved, and it will be solved by this nation. We cannot, if we would, accept the benefits flowing from the Monroe Doctrine, and at the same time evade its responsibilities. It is a part of our manifest destiny. These are important facts with relation to our changed geography and territorial possessions. What of our industrial changes?

To-day this nation is so closely knitted together by railways, postal roads, telegraph and telephone lines that each morning we read at the breakfast table, in our

daily papers, the minutest occurrences from Maine to California, and the intelligence of the happenings in Europe is but a few hours delayed.

The great oceans that wash the shores of this nation were regarded by our fathers as an impassable barrier against the designs and machinations of the ever-warring nations of Europe. And in their day they so thought with reason, for the Bosporus straits and the Dardanelles had held back for a thousand years the cruel Turk in his effort to drive civilization and Christianity from Constantinople; while in their own time the English channel had baffled the genius of Napoleon and held at bay his invincible armies until his military despotism could be destroyed. But from the watery desert of defense, the ocean has been converted by us into a living highway of communication. On the bosom of the seas now float mighty engines of death called "dreadnaughts," carrying guns that shoot farther than any at present employed to guard our coast. Beneath the waters glide silently and stealthily that maritime outlaw, the "submarine," roving the depths of the ocean, seeking here and there its helpless victims, which it may destroy like an assassin at night, without warning or chance of escape. Above the seas, with power to rise and return to the deck of a ship, flits the aëroplane, the cavalry of armies on land and the eyes of navies at sea. Lest the ingenuity of man should leave something undone to abolish the last barrier of the seas, electric cables have been laid on its bottom, connecting us with the great nations of the earth, and the wireless has been established so that we speak across the seas as if by magic. All of this, except the wireless, has been the result of American genius and enterprise. Do not assume that American brain and capital have produced these conditions through love of change and adventure. Back of it lies the nervous energy and restless ambition of a united nation, one hundred million strong, conscious of its power and proud of its achievements. These are some of the ominous facts of to-day.

Throughout the recorded history of man there is no truth better established than that governments, whether monarchial or democratic, are controlled and their destinies determined, not by singular events, or even by a chain of connected events, but rather by a combination of a multitude of circumstances and phenomena extending frequently through centuries, all leaving their impress and exerting an influence which produces changes, revolutions, and sometimes decay. The three score and ten years allotted man does not enable him to judge and exactly estimate this changed phenomena, but by the careful study of the history of nations and peoples who have builded governments in the past, and by observing the operations of governments now established among men, we can collect necessary and valuable data to aid us in properly directing the course of our own nation in the fulfilling of its destiny. Whether you call it fatalism or predestination I do not believe it possible either for the individual or the nation to escape the compelling influences of the powers of nature around about us, or to successfully evade the duties and responsibilities imposed by the law of our being, and the society and government which we have organized.

America one hundred and forty years ago fought the first great battle for freedom and democracy. France shortly thereafter followed through seas of blood and tears. In England the great charter has finally and entirely passed from the barons to the people; Japan is only a monarchy in name; China has established a republic. By a bloodless revolution Russia, the chief of autocracies, has cast off the yoke and has taken her place in the sun of civilization. Can anyone doubt that governmentally we are approaching the end of absolutism; that the thrones of the Hapsburgs and Mohammeds are crumbling; that the military despotism of the Hohenzollerns, no less of Greece and Bulgaria than of Prussia, is doomed, and that the liberty for the patient German people is as certain as freedom for downtrodden Hungary, for despoiled Servia, and for bleeding Armenia?

Personal government has disappeared forever from every part of the Western Hemisphere.

Having observed some of the salient

facts of the twentieth century, what of the law?

The President recently uttered a striking phrase that resounded around the globe when he said, "The world must be made safe for democracy." Armies with their battling millions may destroy kingdoms and overthrow principalities, but law and order, the ripe fruits of peace, can only come from the calm judgment of thoughtful men. The world can never be safe for democracy until the law of liberty is enthroned in the hearts and the minds of men, and Justice guides their footsteps. Sydney Smith long ago most happily expressed this conception when he said: "Truth is Justice's handmaid, Freedom is its child, Peace its companion, Safety walks in its steps."

In God's appointed time, when the world shall be made safe for democracy, will come the imperative duty of making democracy safe for the world. Neither can long exist without the other. Russia and China are striking examples of this truth. To make democracy safe for the world, the world must be educated to appreciate not only its value, but to know its true virtue; *viz.*, equality and justice founded upon law and order.

The American government has been largely a government of lawyers. They wrote the Declaration of Independence and the Federal Constitution. They have been leaders of the people because they have been in close touch with the life of the people. The work of adjusting our laws to the changed conditions of fact which will follow this great war must of necessity be directed by the great lawyers of this country. To make ourselves equal to this task it is needless to say that we must be educated in the legal jurisprudence of the world, both ancient and modern. We can no longer be satisfied with the medieval teachings and principles of the common law. We must establish an international jurisprudence, as it were, which will command the respect and admiration of all democratic nations. To do this our jurisprudence must necessarily be inspired by the principles underlying democracy, rather than by feudal principles upon which autocracy was built.

The supreme court of North Carolina in Thrift v. Elizabeth City, 122 N. C. 31, 30 S. E. 349, 44 L.R.A. 427, very aptly said:

> Our theory of government, proceeding directly from the people and resting upon their will, is essentially different, at least in principle, from England; and common-law maxims and definitions formed while the judges were still under the spell of the feudal system must be construed by us in the light of changed conditions.

How can we develop and establish a jurisprudence to serve as a model for world-wide democracy by attempting to build it upon a common-law system of feudalism, which was promulgated and maintained for the express purpose of suppressing democracy and exalting the feudal lord? Such a system was intended to be the right arm of militarism, and even in England, from the Battle of Runnymede to this good hour, the spirit of democracy has fought to overthrow it.

Our whole political system is founded on a basis entirely different from the mother country. The theory of our institutions is summed up in the famous words of the Declaration of Independence,—"All men are created equal." This has been called a glittering generality. So it is, and so is "the refulgent atmosphere in which we live, and the crystal ocean which girds the globe. Yet what air and water are to man, human equality is to the life of the Republic." We need not the authority of Sir Henry Maine for the statement that this doctrine comes from Roman jurisprudence; that it is not English, and that it is and ever has been unknown to English common law, where the members of the noble order have always enjoyed peculiar privileges, and where, confessedly, the common-law system was established in order to foster and maintain a landed gentry in defiance of and contempt for the democratic masses.

The same distinguished author expresses surprise at the source from which the expounders of the Federal Constitution drew their historical illustrations. In this connection, he says:

> Their writings display an entire familiarity with the Republic of the United Netherlands and Romano-German Empire, but there is one fund of political experience upon which the federalist seldom draws, and that is the political experience of Great Britain.

I am thoroughly convinced that, looking at our legal system of to-day, it can be said with truth that most things in it consistent with natural justice, liberty, and equality came from the Roman civil law, and that its cumbersome, absurd, and unjust features are a survival of the old English common law.

Immediately following the Declaration of Independence in 1776, and inspired with the conviction that all men are created equal, and that a Republic's laws should be so written as to guarantee this equality, in 1778 North Carolina wrote the present chapter on common law which has been preserved to this day unaltered. Instead of glorifying the common law this statute practically destroyed it, but for the spell of the feudal system and common-law maxims and definitions which seem to have possessed some of our judges. In the face of this statute limiting what common law should remain in force in North Carolina, a very distinguished judge wrote in our reports this statement: "The laws of our state rest for a foundation on the common law of England." The best refutation of this assumption is the reproduction of the statute enacted by the people relating to the common law, which shows a manifest purpose to destroy this supposed foundation. I quote in full the legislative declaration as to the common law:

> All such parts of the common law as were heretofore in force and use within this state, or as much of the common law as is not destructive of, or repugnant to, or inconsistent with the freedom and independence of this state and the form of government therein established, and which has not been otherwise provided for in whole or in part, not abrogated, repealed, or become obsolete, are hereby declared to be in full force within this state.

Instead of a blind and idolatrous worship of the English common law, which has completely broken down in that country, we should recognize the truth, that American jurisprudence does not in fact rest upon the common law of England for a foundation, but rather upon the approved teachings and established institutions of the great republics of the earth from which our ancestors so liberally drew in framing the Federal Constitution. The greatest statesmen of England for half a century past, while undertaking to destroy the injustice and the cruelty of the common law of England, and to democratize her institutions along the line of our own, have been unstinted in their praise of what we have done. The great Gladstone said that "the American Constitution is, as far as I can see, the most wonderful work ever struck off at a given time by the brain and purpose of man." Dicey, a noted writer on the English Constitution, says:

> The plain truth is, that educated Englishmen are slowly learning that the American Republic affords the best example of a conservative democracy; and, now that England is becoming democratic, respectable Englishmen are beginning to consider whether the Constitution of the United States may not afford means by which, under new democratic powers, may be preserved the political conservatism dear and habitual to the governing class of England.

We owe much to England, and the debt should never be ignored. It is to be hoped, however, that the present generation will extend its researches in all directions, and if by close study and introspection we shall find that our institutions have about them much of the halo of republican antiquity, we should be proud of it as reflecting the great wisdom and broad learning of our fathers in establishing this great Republic. We are wont to speak of America as the "New World," but, geologically, it is the "Old." Modern science in studying the records furnished by the rocks has discovered that it was in being when Europe was submerged beneath the waves. So also through the political movements of the last century such changes have been worked in the Old World that to-day the Constitution of the United States is almost the oldest in existence, outside of Asia.

I believe that a close study of our leading institutions will show that they are rooted in an older civilization, and a juster one, than the common law of the barbarians. It has been well said:

> In the construction of the Republic, our fathers had the same advantages which any man of fortune possesses who sets out to build a new house. Although not rich in gold, they were heirs of all the wisdom of the ages. They were hampered by no old structures to be modernized, and by no old ma-

terials to be put to use. A continent lay before them on which to build; the whole world was their quarry, and all the past their architects.

What we need in this country is a Bentham. I quote below John Stuart Mill's appreciation of Bentham's judicial fairness and merits, and the nature of the obligations of the world to him:

> Bentham is one of the great seminal minds in England of his age. He is a teacher of teachers. To him it was given to discern more particularly those truths with which existing doctrines were at variance. Bentham has been in this age and country the great questioner of things established. It is by the influence of the modes of thought with which his writings inoculated a considerable number of thinking men that the yoke of authority has been broken, and innumerable opinions finally received on tradition as incontestable are put upon their defense and required to give an account of themselves. Who, before Bentham, dared to speak disrespectfully in express terms of the British Constitution or the English law? . . . Bentham broke the spell. It was not Bentham by his own writings; it was Bentham through the minds and pens which those writings fed, through men in more direct contact with the world, into whom his spirit passed. If the superstition about ancestral wisdom, if the hardest innovation, is no longer scouted because it is an innovation, establishments no longer considered sacred because they are establishments, it will be found that those who have accustomed the public mind to these ideas have learned them in Bentham's school, and that the assault of ancient institutions has been and is carried on for the most part with his weapons.

England herself recognized the need for judicial reforms, and that the old common law was not suited to a modern jurisprudence. Reform after reform has swept over that country, culminating in the Judicature Act of 1873, which practically brushed away the remnants of the common law as useless subtleties, and the tide of ridicule turned back upon the common law itself. This act entirely destroyed the common-law system of pleadings, and its Code of Civil Procedure has gone considerably beyond the provisions of similar codes adopted in this country. This act declared that when there was a conflict between the rules of law and those of equity, the equity rules should prevail.

A lord chief justice of England in 1883 was so bold as to suggest a museum of common-law procedure, as the Yellowstone Park was intended to preserve "the strange and eccentric forms which natural objects sometimes assume." He would establish a kind of "Pleading Park," in which the glories of the negative pregnant, *absque hoc,* replication *de injuria,* rebutter and surrebutter, and all the other weird and fanciful creations of the pleader's brain might be preserved for future ages to gratify the respectful curiosity of our descendants, and then ironically adds: "Where our good old English judges, if ever they revisit the glimpses of the moon, may have some place in which their weary souls can still find the form preferred to the substance, the statement to the thing stated."

With the growth of democracy in England her jurisprudence developed towards the Roman Civil Law, which meant the broadening of democracy and the breaking down of aristocratic caste. As late as 1885 Matthew Arnold wrote:

> Inequality is our bane. . . . Aristocracy now sets up in our country a false ideal, which materializes our higher classes, vulgarizes our middle class, and brutalizes our lower class.

In Kay's work on Social Conditions of the English People, written under the supervision of the Senate of Cambridge University, he says:

> Here where the aristocracy is richer and more powerful than that of any other country of the world, the poor are more depressed, more pauperized, more numerous in comparison to other classes, and more irreligious, and very much worse educated than the poor of any other European nation, solely excepting Russia, Turkey, South Italy, Portugal, and Spain.

Distressing as were the circumstances under which the statement was made, still it must have carried joy to the hearts of millions of plain people in England when Mr. Balfour in a recent address before the two houses of the Canadian Parliament declared that the British Empire had "staked its last dollar on democracy, and that if democracy fails, England will be bankrupt indeed."

Now that Russia, China, Japan, and well nigh all the world, outside of Germany, have joined with the United States to make democracy supreme, let us declare for an international jurisprudence, based upon justice and equality, and cease

once for all this blind worship of the common law.

Perhaps the greatest judge who ever sat upon an English court was Lord Mansfield. For thirty years he presided over the court of the King's Bench, surrounded by men of deep learning and independence of mind, and it is said that his brethren unanimously concurred in all the opinions delivered by him during that period, save two. Lord Campbell in his Lives of the Chief Justices, speaking of Lord Mansfield, said:

> He formed a very low, and I am afraid a very just, estimate of the common law of England, which he was to administer.

No doubt the reason he entertained such an opinion was due to the fact that he was highly educated in the jurisprudence of all nations. The same author tells us:

> He acquired from his study of the Roman Civil Law and the judicial writers produced in modern times by France, Germany, Holland, and Italy, not only a means of doing justice to the parties litigant before him, but in settling with precision and upon sound principles a general rule afterwards to be quoted and recognized as governing all similar cases.

Burke, the great English statesman, said of him:

> His ideas go to the growing amelioration of the law by making its liberality keep pace with the demands of justice and the actual concerns of the world, not restricting the infinitely diversified occasions of men and the rules of natural justice within artificial circumscriptions, but conforming our jurisprudence to the growth of our commerce and of our Empire.

Of course such a man would be criticized in England in that day, and we are told that Lord Mahon, voicing the sentiment of his detractors, said: "The lawyers objected to him because he introduced too much equity into his court." Great offense was this!

Lord Campbell, speaking further of the deficiencies and inadequacies of the common law of England, and failure of the lawmaking department and the courts to remedy these conditions before the time of Lord Mansfield, says:

> The legislature had literally done nothing to supply the insufficiency of feudal law to regulate the concerns of a trading population; and the common-law judges had, generally speaking, been too unenlightened and too timorous to be of much service in improving our Code by judicial decisions. Hence, when questions necessarily arose respecting the buying and selling of goods, and respecting the affreightment of ships, respecting maritime insurance, and respecting bills of exchange and promissory notes, no one knew how they were to be determined. Not a treatise had been published upon any of these subjects, and no cases respecting them were to be found in our books of reports, which swarmed with decisions about lords and villains, marshaling the champions upon a trial of a writ of right by battle, and about the customs of manors, whereby an unchaste widow might save the forfeiture of her dower by riding on a black ram, and in plain language confessing her offense.

To those of us who were taught to worship the names of Coke and Blackstone and to accept as final their every word upon the jurisprudence of England, it must have been very shocking when you learned the real truth about these two exemplars of the common law, and of the times of which they wrote. No one has ever questioned the transcendent ability of Lord Coke, but this is the most that can be said of him. He was cruel and heartless beyond expression. The part which he played in the prosecution of Sir Walter Raleigh has forever damned him in the minds of just men. He prostituted his office as attorney general of England in the trial of that case to such an extent that Lord Mansfield declared that he would not have made the speech which Lord Coke made for all the wealth and fame which Coke acquired. Coke in this arraignment of Sir Walter Raleigh said: "Thou art the most notorious traitor that ever came before the bar. Thou art a monster with an English face and a Spanish heart." Raleigh undertook to reply, but Coke, thundering at him, said: "Thou shalt not." The lord chief justice of England presided over this trial with eleven other judges. Raleigh was denied counsel in his defense, and the court, in order to make certain of his conviction, swapped juries on him after the trial had begun. Raleigh contended that upon the charge of treason the government must produce two witnesses, and that he had the right to be confronted with his accuser. Both of these manifest rights were denied him upon the insistence of Coke, who knew that, beginning with the Mosaic law, it had been written in every code of laws preceding his time that as many as two witnesses to

the fact were necessary in such cases. After Raleigh was executed Coke confessed the wrong he did him.

The conduct of the court that tried Sir Walter Raleigh, and the language of the lord chief justice in pronouncing sentence, were but little less cruel and brutal than that of Coke. The judgment which was pronounced by the court at that time was illustrative of the criminal branch of English jurisprudence existing under the common law. I quote the concluding paragraph of the court's sentence:

> That you shall be had from hence to the place whence you came, there to remain until the day of execution, and from thence you shall be drawn upon a hurdle through the streets to the place of execution, there to be hanged, and cut down alive, and your body shall be opened, your heart and bowels plucked out, and your privy members cut off and thrown into the fire before your eyes; then your head to be struck off from your body and your body divided into four parts, to be disposed of at the King's pleasure, and may God have mercy on your soul.

And yet we have been told that a system of laws which administered this kind of justice is the foundation of our laws, and that its chief apostle, with all of his cruelty and inhumanity, should continue to be held up as our revered exemplar. I deny it.

The other great common-law author who professed in his time to have demonstrated that the English common law was perfect, and that there was nothing to be added to and nothing to be taken from it, was Sir William Blackstone. What has taken place in his own country with relation to the common law of England since his Commentaries were published is of itself a rather sad commentary on his Commentaries, and now that the students and jurists are looking at jurisprudence through the eyes of twentieth-century knowledge, tempered by the spiritual influence of the age, a rather poor opinion is entertained of Mr. Blackstone's treatise, except that it forms an interesting historical link in the progress of English jurisprudence. But as a treatise it has long since ceased to be greatly valued in England, and I think the time has arrived to speak plainly the truth about its merits as affecting our own jurisprudence. Some of you may be surprised at the foregoing statement; if so, read the article on Blackstone published in the eleventh edition of the Encyclopædia Britannica, copyrighted by the chancellors, masters, and scholars of the University of Cambridge, and you will be shocked. As illustrative of this thought I quote a few extracts from this article:

> Blackstone was by no means what would now be called a scientific jurist. He has only the vaguest possible grasp of the elementary conceptions of law, he evidently regards the law of gravitation, the law of nature, and the law of England as different examples of the same principle, as rules of action or conduct imposed by a superior power on its subjects. . . . In distinguishing between private and public wrongs he fails to seize the true principle of the division. Even in discussing a subject of such immense importance as equity, he hardly takes pains to discriminate between the legal and popular senses of the word, and from the small place equity jurisprudence occupies in his arrangement he would scarcely seem to have realized its true position in the law of England. . . . It is more correct to regard it as a handbook of the law for laymen than as a legal treatise.
>
> Bentham accuses him of being the enemy of reform and the unscrupulous champion of every form of professional chicanery. Austin said that he truckled to the sinister interest and mischievous prejudices of power, and that he flattered the overweening conceit of the English in their own institutions.

Mr. Blackstone accepted without question the superstitions and injustices of the law, and undertook to disarm all inquiry as to its reason or philosophy. Listen to this declaration in his Commentaries, vol. 4, page 60: "To deny the possibility, nay, actual existence, of witchcraft and sorcery, is at once flatly to contradict the revealed word of God, in various passages both of the Old and New Testament, and the thing itself was the truth," and that these crimes are punishable with death by fire.

It appears to me that the lawyers of America, and even the judges of our highest courts, are attaching too much importance to the influence of the common law upon our jurisprudence, and too little importance to the philosophy and jurisprudence of the world as interpreted and understood by students of the twentieth century. I call your attention to the preface of the second edition of Wigmore on Evidence. He observes:

One who has perused several thousand contemporary decisions cannot help forming some impressions of their juridical qualities.

As a result of these impressions he says of the judges writing the opinions, speaking generally, that their acquaintance with legal history is almost totally lacking, that to them the philosophy and jurisprudence of the law is unknown, and that whenever there is an expounding of history Blackstone suffices.

For the judiciary's purposes, the world stopped with him.

Professor Wigmore's statement is, I think, extreme. Still it should demand our very serious consideration, because if the judges of our highest courts are subject to such condemnation, how must the average lawyer appear?

I do not believe we have fully realized the influence of the Mosaic Law and the Roman Civil Law upon our institutions. Pollock and Maitland in their exhaustive work on the History of English Law make this remarkable statement:

Coming to the solid ground of known history we find that our laws have been formed in the main from the stock of Teutonic customs, with some additional change made and considerable additions or modifications of form received directly or indirectly from the Roman system. Both the Germanic and Romanic elements have been constituted or reinforced at different times and from different sources.

Historians generally agree that to the Romans we must ever look, as essentially practical men, architects of empires, great lawgivers, and molders of democratic institutions. Gibbons says:

If a man were called upon to fix the period in the history of the world during which the condition of the human race was most happy and prosperous, he would without hesitation name that which elapsed from the death of Domitian to the accession of Commodus. The vast extent of the Roman empire was governed by absolute power under the guidance of virtue and wisdom. The armies were restrained by the firm but gentle hand of five successive emperors whose character and authority commanded involuntary respect. The forms of the civil administration were carefully observed by Nerva, Trajan, Hadrian, and the Antonines, who delighted in the image of liberty and were pleased with considering themselves as the accountable ministers of the law.

Chancellor Kent says of the Pandects of Justinian that with all their errors and imperfections they are "the greatest repository of sound legal principles applied to the private life and the business of mankind that has ever appeared in any age or nation."

George Boyer observes:

The corpus of civil law is a judicial compilation which contains the whole science of jurisprudence," and Robey adds "that the civil law of Rome is to-day the principal source of private law in all the civilized countries of the world.

Grotius built upon this foundation the modern system of international law. Lord Mansfield borrowed the principles from this law which gave to his name an imperishable renown as the Father of English Commercial Jurisprudence.

The thoughtful student of legal history has already discerned what I believe to be unobserved and unappreciated by the general practitioner, that the rapid changes in our legal system now in progress are mainly attributable to the fact that we have cut loose the fetters of the common law, and are harking back, perhaps unconsciously, to the laws and system of jurisprudence established by the great republics that preceded the Christian era.

Justice Holmes in a notable address at the 50th anniversary of Harvard College, delivered before its Law School Association, speaking of Judge Story as a great student of the civil law, said:

But Story's simple philosophizing has ceased to satisfy men's minds. I think it might be said with safety that no man of his or of the succeeding generation could have stated the law in a form that deserves to abide, because neither his nor the succeeding generation possessed or could have possessed the historical knowledge, had made or could have made the analysis of principles, which are necessary before the cardinal doctrines of the law can be known and understood in their precise contours and in their innermost meanings.

This new work is now being done. Under the influence of Germany, science is gradually drawing legal history into its sphere. The facts are being scrutinized by eyes microscopic in intensity and panoramic in scope. At the same time, under the influence of our revived interest in philosophical speculation, a thousand heads are analyzing and generalizing the rules of the law and the ground on which they stand. The law has got to be stated over again, and I venture to say that in fifty years we shall have it in a form of which no man could have dreamed fifty years ago.

This is an ominous prophecy and presents a very serious thought. All history agrees that it was the Teutonic barbarian who in the early centuries overran Rome and Greece, and by sheer brute force and indomitable will destroyed, or undertook to destroy forever, all that was great and noble of ancient civilization. The educated Teuton of to-day, with no less resolve and with scarcely less brutality, has marshaled all the resources of science and invention, supplemented by an amazing capacity for self-sacrifice, and is making a determined drive to again become the undisputed ruler of the world.

To stem this rising and formidable tide, of course force must be matched against force, but if the democracies of the world are to survive this onslaught, something more than physical force must be employed. It is imperative that we develop an intellectual efficiency, unrestricted by the narrow provincialism of English law and learning, or the learning of any particular country, and look for precedents to the four corners of the earth, beginning at civilization's earliest dawn, and glean and garner as our own the wisdom of the ages in law, science, and government.

England's criminal jurisprudence was for many centuries, perhaps, the most cruel of any known to European countries, save and except Persia, and its procedure and practice, viewed in the light of present-day jurisprudence, was positively ridiculous. Feudalism had no law of personal property; it was chiefly concerned with real estate and feudal tenures. Bracton sought to supply the defect, and in doing so drew largely upon the Justinian Code. A noted American law writer has said:

> The more the subject is examined, the more certainly it will be found that only two salient features of the old common law of England are left to us. These are, trial by jury, and adherence to precedent; and they belong not to the substantive, but to the adjective or administrative, law.

Feudalism was the foundation of Blackstone's treaty on real property. We have abolished it in this country, root and branch. I fully appreciate the value of the jury system, but as to this, it is instructive to know that the attorney general of England recently recommended to Parliament the abolishment of the grand jury system as being antiquated and capable of no further useful service in the realm. As to the remaining feature of the common law,—adherence to precedent,—I most unqualifiedly subscribe, but as the law is an ever-developing science, it is folly to blindly adhere to precedents which were established by courts administering a feudal system, or by judges who were apparently ignorant of the development of the law or the existence of any jurisprudence save that which was established by a monarchy, and oftentimes shamefully administered in the interest of the King, who, under its false philosophy, "could do no wrong."

Precedent should always be persuasive, but not decisive, except it has become a rule of property, or is the decision of a superior tribunal. In law, as in all things else, nothing should ever be finally decided until it is decided right.

In assuming the task which lies immediately before us, of perfecting a jurisprudence which, like our democratic institutions, will appeal to the enlightened judgment of mankind wherever justice is loved and liberty is respected, I invite you to the contemplation of fields of legal lore established by the republics of the past, where we may look with confidence for the wisest and best products of the human mind that have ever been promulgated for the government of men. It is a significant fact that, in the realm of science, morals, and jurisprudence, the richest contributions to society have been made, not by monarchies or autocracies, but by republics, and their respective jurisprudence has been the result of their regard for precedent, and a willingness to perfect the legal institutions of their day by a deep study of the then and previously existing institutions which were known to them. These enlightened laws were always expressed in the form of a code.

It has been truly said that "first of all the Municipal Codes of the world in their importance to us, and relatively also the first in the embodiment of the law of nature in statute form, although by no means the first in order of time, the so-called Mosaic law demands our consideration."

More than fifteen centuries before the Christian era Moses led the children of Israel out of Egypt, and in the wilderness established a democracy. He prepared a Code of Laws and addressed it to a free people. It is no exaggeration to say that, regarding Moses merely from the human standpoint as being the author of the Code of Law which bears his name, he has more profoundly influenced the human race than any other lawgiver that has ever lived. It is interesting to note how Moses had regard for precedent. Egypt in those days was noted for its learning, and the Hebrew lawgiver did not hesitate to adopt a number of its laws and institutions for the government of his own countrymen. We are told that Moses was instructed in the "wisdom of the Egyptians" (Acts of the Apostles, chap. vii: 22). The similarity between the Mosaic Code and the Egyptian law supports this statement. Both systems had the week of seven days and provided punishment for perjury and false testimony. Both Codes were equally mild in their criminal branches as compared with the severe penalties of other nations. In both there were provisions for the commutation of penalty on the ground of extenuating circumstances.

When we consider how nearly our own laws are like the laws of Moses, we must realize the great influence which they have and are now exerting upon our jurisprudence. Consider for a moment the Ten Commandments promulgated by this great lawgiver as received from Mt. Sinai. They are the embodiment of the moral law, and, at last, all human law must begin with and be grounded in the moral law if it is to survive. It is interesting and instructive to note that while the Ten Commandments are usually regarded as purely religious and only binding upon the conscience, as a matter of fact only two of the Ten Commandments are of a purely spiritual or religious character; another is as much of temporal as of religious importance; the other seven deal almost exclusively with the organization of human society, and form a solid basis for what we are pleased to call municipal law. Three of the Ten Commandments expressly refer to domestic relations, and another enunciates the doctrine of the sacredness of human life. In two the law of private property is epitomized, and the administration of justice is bound up in the precept, "Thou shalt not bear false witness against thy neighbor." These several commandments are the inspiration of the municipal law of our land to-day. For instance, there is no law in North Carolina declaring thou shalt not kill, but we have predicated a statute upon the Mosaic law fixing the punishment for homicide.

The next notable system of laws and jurisprudence which history records developed under the democracy of Ancient Greece. Solon prepared a Code of these laws which has made his name famous. He seems to have studied deeply the philosophy of his time and political economy. We are told that in the preparation of his Code he drew upon all the civilizations of the past that contributed anything worth while to jurisprudence, and to acquire this information he traveled extensively in Asia Minor, Cypress, Crete, and Egypt.

Let us see how much, in fact, we are indebted to the jurisprudence of Solon: It was in the Code of Solon that the mandate first appeared, "Let no man have more than one wife." Coupled with the declaration of Moses that man should have but one God, we have established the two most powerful factors in modern civilization,—the monotheism of Israel, and the monogamy of Greece. Indeed, we are so much indebted to the Republic of Greece that I would not dare in this brief space to undertake to enumerate our obligations. It has been beautifully said that,

> Like the sun at noonday is the civilization of Ancient Greece among the civilizations of the world. Never before and never since has there existed on this earth a people more energetic, more enterprising, more versatile, more ingenuous, more artistic, more literary, more philosophical, more cultured, in all the departments of human knowledge than the Greeks of classical story.

We are familiar with its poetry and oratory, its philosophy and history, its architecture and its sculpture, all of which testify that republican institutions are best capable for developing the highest civilization. This conclusion is verified

by the examples of Republican Israel, Republican Rome, the Republican State of Italy in the period of Renaissance, the Republican State of Holland, and, inspired by their examples, the more modern Republics of America and France. Even the language of Greece, which is supposed to be dead, still lives in this Republic, and science is ever drawing upon it to give names to its latest and greatest inventions. Coming from Greek origins are the modern words, "telegram," "telephone," "photograph," and "automobile," and the medical science turned to the Greek language for a name for its greatest discovery,—"anesthetic."

We will now consider the Roman Republic. In my opinion the civil law of Rome as fashioned and perfected in the Code, the Digest, and the Institutes of Justinian, is of so much more importance to the Republic of America in this, the twentieth century, than is the English common law, that I shall not apologize for elaborating the point which I am seeking to establish; *viz.*, that in seeking for precedent to guide a world democracy we should attach great importance to the jurisprudence of the only democratic world empire that has ever been established on earth. Be it remembered, however, that even Justinian did not claim for the civil law of Rome, with all of its democratic jewels, that finality and perfection which Blackstone claimed for the common law of England, when he said "it was the perfection of human reason." It may be remarked parentheticall-ly that so ridiculous was this statement of Blackstone that his student Bentham, only twenty years of age, is reported to have actually laughed at him when he first made it in his lectures.

Recognizing the truth that a great jurisprudence must be built upon the experience and wisdom of all nations rather than one, Rome set about to seek out all the predecents that were suitable to a democracy, and to incorporate them into her marvelous jurisprudence.

What Greece did for the higher esthetic culture, that Rome did for law, good government, and statecraft. It has been truly said:

> The one made life beautiful, the other made it secure.

> The Roman's conception of law has become the model upon which all jurisprudence has been molded, the state as he founded it being based upon the great principles of reciprocity and self-sacrifice on the one side, and of the protection of the sanctity of private rights on the other.

Lord Redesdale very truly observes:

> There have been great jurists in many nations, professors learned in the law,—laws have been amplified and changed to meet circumstances; but no single nation has ever raised such a legal monument as that of the Romans, which, according to Professor Leist, is "the everlasting teacher for the civilized world, and will so remain."

It is interesting to study how the Roman jurists adopted in their compilations precedents from many other nations, and which, notwithstanding the overthrow of Rome, survived the Dark Ages, reappeared in the English law and the Germanic, and which we have adopted as a part of our jurisprudence. Much of this has been attributed to the English common law, when in truth the best part of the English law which we have adopted as our own was simply borrowed by it either from the Mosaic, Solonic, or Justinian Code.

A peculiarity of the Roman character was that they did not believe that they possessed all the virtues and wisdom, and that nothing was to be learned from the experience of other nations. On the contrary, the Romans seem to have been intelligent students, accepting anything from other nations, and especially from Greece, which was deemed to be advantageous and superior to what they already had. A Roman commission was organized and sent to Greece about 450 B. C., and a close study of the Solonic Code was made, which afterwards found expression in what is commonly known as "the Law of the Twelve Tables." These were the foundation upon which all subsequent Roman law was built. The Justinian Code is divided into twelve books, classified according to subjects, with a statement of the time when each enactment was first made. This is substantially the plan pursued by the United States government in publishing its Revised Statutes.

It is both interesting and important to observe the origin and development of

the cardinal principles of our jurisprudence, from which it will appear that most of the things that we prize as valuable to republican institutions have either been taken directly from the Roman civil law, or indirectly through England from the Roman law. By a still deeper examination of the subject it will be seen that many of these laws were even adopted into the Roman civil law. For instance, the maritime and admiralty law of the civilized world to-day came from the Roman civil law, but Rome in turn adopted it from the little island of Rhodes in the Eastern Mediterranean, which was a colony of Phœnicia.

Republican Rome enjoyed a social system more nearly like ours of to-day than our system resembles that of England in the time of Coke and Blackstone. "Their citizens were free, there were no degrees among them, no titled nobility, nor privileged aristocracy; no hereditary castes; all persons were equal before the law. The ownership of land was allodial or absolute, as with us. The land was available for all the purposes of commerce, was freely transferable by deed or will, and passed equally by inheritance to all children, male and female, alike. Husbands and wives were virtually partners in respect of their rights of property, and married women were perfectly free to control their own separate estates." Probably the most conspicuous illustration of the triumph of the Roman law with us is the emancipation of women and restoration to married women of the right to control their own separate property independently of their husbands. It is a repudiation of the common-law theory of the legal merger of the wife's entity with that of her husband. Mr. Bryce says: "Not till 1870 did the British Parliament take the step which the Romans had taken long before the Christian era, which allowed whatever a woman possessed at her marriage, or receives after it, or earned for herself, to remain her own as if she were unmarried." By these slow degrees," he adds, "has the English wife risen at last to the level of the Roman."

Equity jurisprudence is a product of the Roman law. It is a significant fact that in the exhaustive and monumental work of Littleton he makes no mention of equitable estates, although they then existed. But we are told that in his will, which is still extant, he expressly created an equitable estate in his own property. This character of estates was derived from the Roman law. It will be recalled by the student of English history that a great war waged in England for many years between the advocates of the common law led by Coke and the champions of equity principles led by Bacon and Ellesmere. The triumph of equity in this contest was the beginning of the supremacy of the civil law over feudalism.

When we consider the glory of Rome and her institutions, and how much we to-day find to appreciate and admire in her jurisprudence, it is sad to contemplate that through ignorance, vice, and savagery such a jurisprudence should have gone in an eclipse for more than a thousand years. It has been said that

> Probably the darkest hour in the annals of time since the fathers of the human race went forth from Ararat, was that when the barbarians of the North burst through the barriers of the Roman Empire, drenched the plains of Gaul and Italy with blood, desolated their cities, ravaged their homes, covered the Mediterranean with their piratical fleets, destroyed the ancient marts of commerce plundered the shrines of art and science, almost annihilated literature, subverted all the safeguards of society, and for the civilization of Rome substituted the unmitigated barbarity of the sword.

After the dark and dreary night of the centuries when civilization again asserted itself, and Europe became desirous for law and order, it turned back to the fountain of Justice and Liberty at which the pitcher of Civilization had been broken, and began all over to drink from its still overflowing wells.

Napoleon, who rearranged the map of Europe with his sword, and demonstrated at Marengo and Austerlitz his greatness as a warrior, saw that to maintain an empire it was necessary to have a code of just laws suitable to the times and conditions. He accordingly appointed a commission of able jurists to seek out for precedent, and he naturally directed them to make the Code of Justin-

ian the foundation for their laws. Though the conqueror fell and his victories are forgotten, his Code still lives.

At this moment the law whose foundations were laid in the Roman Forum, illumined by the precedents of the Mosaic and Grecian Codes, commands a wider area of the earth's surface than all other systems combined. I give you its domain: Italy, Spain, Portugal, Switzerland, France, Germany, Austro-Hungary, Belgium, Holland, Denmark, Norway, Sweden, Russia, the state of Louisiana, Quebec, Ceylon, British Guiana, South Africa, German Africa, French Africa, Mexico, Central America, South America, Philippine Islands, Dutch and French East Indies, Siberia, and Scotland.

In the *résumé* of nations which have contributed to modern jurisprudence I have omitted the mention of China. While possessing the oldest of civilizations, she seems to have pursued a line of thought and action the reverse of all mankind. In reading, instead of starting at the top of the page and reading down, the Chinaman begins at the bottom and reads up. A witty Englishman has written of her:

> It is a land where the roses have no fragrance, and the women no petticoats; where the laborer has no Sabbath, and the magistrate has no sense of honor; where the needle points to the South, and the sign of being puzzled is to scratch the antipodes of the head; where the place of honor is on the left hand, and the seat of intelligence is in the stomach; where to take off your hat is an insolent gesture, and to wear white garments is to put yourself in mourning.

It is no answer to say that Greece and Rome fell and their power passed away. So also did Babylon, Phœnicia, Egypt, and all the monarchies of the past. But who will deny that in re-establishing the law of civilization after the Dark Ages, that all free people have looked with increasing admiration and profit to the Republics of Israel, Greece, and Rome. It seems to me that the students of the law coming to the bar, as well as those already at the bar, should study anew the foundations of our law. With 6,000 years of history behind us, and the illuminating teachings of the Nazarene, we ought to be able to develop a jurisprudence that will be in keeping with the aims and aspirations of this Republic, so that when our armies have destroyed those who would by force suppress democracy that we, as lawmakers, may be able to establish international laws and customs among the Republics of the world, based upon righteousness and justice and supported by the moral consciousness of mankind.

Then will Tennyson's dream be realized:

> Till the war drum throbb'd no longer, and the battle flags were furl'd
> In the parliament of man, the federation of the world.

I do not belong to that school of thought which believes that this great world war is an impeachment of religion. On the contrary, I believe that out of it will come a stronger brotherhood of man and the acknowledged Fatherhood of God. I look to see with the growth of democracies, and a guaranteed freedom to the peoples of the earth, a more earnest recurrence to the ancient principles and laws of the first republic, which Moses established and so beautifully expressed in the Ten Commandments. The supreme court of a sister state in a recent decision, discussing the influences of the moral law in this country, said:

> These commandments which, like a collection of diamonds, bear testimony to their own intrinsic worth, in themselves appeal to us as coming from a superhuman or divine source, and no conscientious or reasonable man has yet been able to find a flaw in them. Absolutely flawless, negative in terms, but positive in meaning, they easily stand at the head of our whole moral system, and no nation or people can long continue a happy existence in open violation of them. . . . It makes the law of morality concur fully with the laws of religion. According to it, he who serves man best, worships God best, and he who worships God best serves man best.

Judge Dillon, in his work on the Laws and Jurisprudence of England and America, very beautifully says:

> Not less wondrous than the revelations of the starry heavens, and much more important, and to no class of men more so than lawyers, is the moral law which Kant found within himself, and which is likewise found within, and is consciously recognized by every man. This moral law holds its dominion by divine ordinance over us all, from which escape or evasion is impossible. This

moral law is the eternal and indestructible seal of justice and of right, written by God on the living tablets of the human heart and revealed in his Holy Word.

The two mighty forces which must control the world and inspire it to higher ideals and more efficient service in government and law are organized business and Christianized religion. Business has given to religious endeavor efficiency and co-operation. Christianized religion has given to business a spirit of fair dealing and a desire for social service. Both are demanding of the law and the lawyer a recognition of these truths, and an administration by the courts of more equity and less technical law.

Are we prepared to assume and live up to these responsibilities and ideals?

The regenerator of England and the acknowledged leader of democracy in Europe is a Welsh lawyer,—Lloyd-George. The spokesman for democracy in the Western Hemisphere is a trained lawyer,—Woodrow Wilson. Upon the shoulders of these two men largely rest the direction of the military operations of the greatest conflict ever waged among men, and the hope of democracy on two continents.

Mr. Wilson very clearly understands the important relation of the law to twentieth-century facts, for he has recently said:

In these processes of adjustment, much depends upon the just and swift administration of the law. As it is to-day, the procedure of our courts is antiquated, and a hindrance, not a help, in the matter of speedy and even-handed justice. Fundamental and far-reaching reforms must be undertaken to make courts of justice out of courts of law.

Let us build and perfect an American jurisprudence of our own, which shall be illumined by the wisdom and statesmanship of all nations, both ancient and modern. A jurisprudence that will not only conserve a great and happy people, but live on, as a model code of justice for generations yet unborn.

I speak for an educated bar that will clearly conceive and intelligently understand the importance of a world jurisprudence, particularly suited and adapted to free men, where tyranny is abhorred and justice is revered, where righteousness is the uplifting spirit of the law, and brotherly love its inspiration.

The realization of this mighty ambition, now hoped for by well nigh all the civilized peoples of the earth, must, in the very nature of things, be confided to lawyers. To this glorious task and wonderful opportunity I am raising my voice, in the hope that American lawyers, North Carolina lawyers, may catch the spirit, so that when the readjustment of a world's society shall come, their vision and their influence may be felt in the councils of the greatest jurists and in the parliament of nations.

Appropriation of Private Property for Public Use in War Times

BY GEORGE A. KING

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[Continued from the December Case and Comment]

IT IS likely to happen in this war, as in previous wars, that supplies will be seized or destroyed for public use without express legislative authority. As to such cases the Supreme Court of the United States has said (United States v. Russell, 13 Wall. 623, 627, 628, 20 L. ed. 474, 475):

"Private property, the Constitution provides, shall not be taken for public use without just compensation, and it is clear that there are few safeguards ordained in the fundamental law against oppression and the exercise of arbitrary power of more ancient origin or of greater value to the citizen, as the provision for compensation, except in certain extreme cases, is a condition precedent annexed to the right of the government to deprive the owner of his property without his consent. Extraordinary and unforeseen occasions arise, however, beyond all doubt, in cases of extreme necessity in time of war or of immediate and impending public danger, in which private property may be impressed into the public service, or may be seized and appropriated to the public use, or may even be destroyed without the consent of the owner. Unquestionably such extreme cases may arise, as where the property taken is imperatively necessary in time of war to construct defenses for the preservation of a military post at the moment of an impending attack by the enemy, or for food or medicine for a sick and famishing army utterly destitute and without other means of such supplies, or to transport troops, munitions of war, or clothing to reinforce or supply an army in a distant field, where the necessity for such reinforcement or supplies is extreme and imperative, to enable those in command of the post to maintain their position or to repel an impending attack, provided it appears that other means of transportation could not be obtained, and that the transports impressed for the purpose were imperatively required for such immediate use. Where such an extraordinary and unforeseen emergency occurs in the public service in time of war no doubt is entertained that the power of the government is ample to supply for the moment the public wants in that way to the extent of the immediate public exigency, but the public danger must be immediate, imminent, and impending, and the emergency in the public service must be extreme and imperative, and such as will not admit of delay or a resort to any other source of supply, and the circumstances must be such as imperatively require the exercise of that extreme power in respect to the particular property so impressed, appropriated, or destroyed. Exigencies of the kind do arise in time of war or impending public danger, but it is the emergency, as was said by a great magistrate, that gives the right, and it is clear that the emergency must be shown to exist before the taking can be justified. Such a justification may be shown, and when shown the rule is well settled that the officer taking private property for such a purpose, if the emergency is fully proved, is not a trespasser, and that the government is bound to make full compensation to the owner.

. . . . . .

Private rights, under such extreme and imperious circumstances, must give way for the time to the public good, but the government must make full restitution for the sacrifice."

While the statement just quoted from the Supreme Court seems to be put in rather extreme language as to the immediate public danger which will justify seizure of private property, it must be remembered that the courts in considering a case of this character are likely to put themselves in the place of the officer seizing the property, and to consider the emergency as it appeared at the time to the mind of the public officer determined to serve the interest of the government, rather than as it may later in a time of tranquillity appear, when perhaps a court might think that the officer could have dispensed with the seizure.

Perhaps the principle was stated in better language in the opinion of the Court of Claims in the same case, and as this decision was affirmed by the Supreme Court, the language may be regarded as authoritative. That decision said (Rus-

sell v. United States, 5 Ct. Cl. 121, 131, 132):

"The right of the government, in times of peril or great public exigencies, to take and apply the property of any citizen to secure the safety or well-being of the government, is not disputed, but admitted to the full extent. But under a just and free government like ours, such a procedure is only resorted to and can only be justified when the public necessities are pressing and the peril is imminent. And even in all such cases, the obligation of the government to make, and the citizens to receive, just compensation for the property so taken, is complete and perfect."

A very able judge of the Court of Claims, afterwards its chief justice, in a footnote to the decision of the Supreme Court in this same case thus construes it (7 Ct. Cl. 227, 228):

"But where the property is *used*, so that a direct benefit results to the government from the taking, it would seem that the government is 'in good conscience' bound to pay the citizen for what he has directly lost, and it has directly gained. The proposition implied is not necessarily involved in this case, and therefore is not stated in the syllabus; and the decision of the Court of Claims in the Fremont Contract Cases, 1 Ct. Cl. 1, is still unreversed, viz., that implied contract arises where the property taken is used in the service of the government by the proper officers of the government, and a benefit directly accrues to the government thereby."

In a later case the Supreme Court defined the classes of war damages for which compensation might be claimed. It referred to "claims where property of loyal citizens is taken for the service of our armies, such as vessels, steamboats, and the like, for the transport of troops and munitions of war; or buildings to be used as storehouses and places of deposit of war material, or to house soldiers or take care of the sick, or claims for supplies seized and appropriated. In such cases it has been the practice of the government to make compensation for the property taken. Its obligation to do so is supposed to rest upon the general principle of justice that compensation should be made where private property is taken for public use, although the seizure and appropriation of private property under such circumstances by the military authorities may not be within the terms of the constitutional clause" (United States v. Pacific R. Co. 120 U. S. 227, 239, 30 L. ed. 634, 638, 7 Sup. Ct. Rep. 490).

In an earlier opinion of the Court of Claims Judge Wilmot in language of classic elegance lays down the true principle (Grant v. United States, 1 Ct. Cl. 41, 43):

"Whenever, from necessity or policy, a state appropriates to public use the private property of an individual, it is *obliged* by a law as imperative as that in virtue of which it makes the appropriation, to give to the party aggrieved redress commensurate with the injury he has sustained. Upon any other principle the social compact would work mischief and wrong. The state would have the right to impoverish the citizen it was established to protect; to trample on those rights of property, security for which was one of the great objects of its creation."

These authorities show that those whose property shall be taken in this war to supply the necessities of the Army or Navy, even without express legislative authority, will have the right to recover its full value.

Inventions Used by the Government.

By Act of June 25, 1910 (36 Stat. at L. 851, 852, chap. 423, Comp. Stat. 1916, § 9465) it is provided, "That whenever an invention described in and covered by a patent of the United States shall hereafter be used by the United States without license of the owner thereof or lawful right to use the same, such owner may recover reasonable compensation for such use by suit in the Court of Claims."

This statute is in force in war time equally with time of peace. To comment fully on it would require a separate paper. Such a paper was prepared by the present writer immediately after its passage and read before the patent section of the American Bar Association at its meeting of 1910, and later republished with extensive revisions.

An act approved October 6, 1917, entitled, "An act to prevent the publication of inventions by the grant of patents that might be detrimental to the public safety or convey useful information to the enemy, to stimulate invention, and provide adequate protection to owners of patents, and for other purposes," provides:

"That whenever during a time when the United States is at war the publication of an invention by the granting of a patent might, in the opinion of the Commissioner of Patents, be detrimental to the public safety or defense or might assist the enemy or endanger

the successful prosecution of the war he may order that the invention be kept secret and withhold the grant of a patent until the termination of the war: *Provided,* That the invention disclosed in the application for said patent may be held abandoned upon its being established before or by the commissioner that in violation of said order said invention has been published or that an application for a patent therefor has been filed in a foreign country by the inventor or his assigns or legal representatives, without the consent or approval of the Commissioner of Patents, or under a license of the Secretary of Commerce as provided by law.

"When an applicant whose patent is withheld as herein provided and who faithfully obeys the order of the Commissioner of Patents above referred to shall tender his invention to the Government of the United States for its use, he shall, if and when he ultimately received a patent, have the right to sue for compensation in the Court of Claims, such right to compensation to begin from the date of the use of the invention by the Government."

The same provision is enacted in similar, though not identical terms, as § 10, ¶ (*i*) of the "Trading with the Enemy Act" of the same date.

In the report of the Senate Committee on Patents accompanying the bill which became the act of October 6, 1917 (Senate Report No. 119, 65th Congress, 1st Session), it was stated as one important purpose of the bill that the disclosure of inventions of military use would convey to the enemy information which could be used against ourselves and would in other respects be detrimental to the public safety and defense.

The bill was recommended by the Secretaries of War and of the Navy, the Naval Consulting Board and the Commissioner of Patents. It was stated by the Senate committee:

"Under the provisions of the present law patentees can only recover compensation for the use of their inventions by the government, subsequent to the dates upon which patents were granted. In all justice and equity to inventors it is essential that they be enabled to secure compensation for use by the government of their inventions during the war or for such use while the applications for patents for said inventions are withheld from issue until the termination of the war, when the patents upon which they may sue are finally granted. Otherwise, if applications are withheld from issue or patents are not granted during the war, there can be no claim for compensation except as now provided in the proposed act."

Thus the government provides for compensating the inventor for the use of his invention, while safeguarding the public from the danger that might occur from its public disclosure.

All suits against the government for compensation for use of inventions, either where covered by a patent under the Act of 1910 or when kept secret in the public interest under the Act of 1917, can be brought only in the Court of Claims.

Wheat Guaranty.

By § 14 of the Food Control Act the government gives an absolute guaranty to every producer of wheat of a price for the crop of 1918, based upon number one northern spring or its equivalent, of not less than $2 a bushel, at the principal interior primary markets. The guaranty for the crop of that year is made absolute and unconditional.

The President is also authorized, as far in advance of seeding time as practicable, to determine and fix and give public notice of what is a reasonable guaranteed price for other crops, in order to guarantee a reasonable profit; and thereupon the government of the United States guarantees every producer of wheat grown within the United States that upon compliance by him with the regulations prescribed he shall receive for any wheat produced in reliance upon this guaranty a price not less than the guaranteed price therefor as fixed pursuant to that section.

Constitutional Questions.

The first question which naturally arises in regard to all these provisions is: Are they constitutional?

This question arises in war time as in peace. The Supreme Court has said in Ex parte Milligan, 4 Wall. 120, 18 L. ed. 295:

"The Constitution of the United States is a law for rulers and people, equally in war and in peace, and covers with the shield of its protection all classes of men, at all times, and under all circumstances."

It is also true, however, that there are provisions of the Constitution granting power to the government in time of war which it may not have in time of peace. It does not follow that because much of the legislation which we have been con-

sidering is unprecedented, it is for that reason unconstitutional.

The constitutional provisions which may be supposed to have some bearing on the subject are those of article 1, § 8:

"The Congress shall have power . . . To declare war, . . . and make rules concerning captures on land and water; To raise and support armies; . . . To provide and maintain a Navy; To make rules for the government and regulation of the land and naval forces; . . . To make all laws which shall be necessary and proper for carrying into execution the foregoing powers, and all other powers vested by this Constitution in the government of the United States, or in any department or officer thereof."

Also the provisions of the 5th Amendment:

"No person shall . . . be deprived of life, liberty or property, without due process of law; nor shall private property be taken for public use, without just compensation."

We may divide the provisions we have been considering into three classes with reference to their constitutionality:

1. All such provisions as look to the seizure and appropriation of private property for purposes connected with the military defense of the country are beyond all just question within the constitutional powers of the government.

The Supreme Court has said (United States v. Lynah, 188 U. S. 445, 465, 47 L. ed. 539, 546, 23 Sup. Ct. Rep. 349):

"All private property is held subject to the necessities of the government. The right of eminent domain underlies all such rights of property. The government may take personal or real property whenever its necessities or the exigencies of the occasion demand."

More specifically, with reference to war, it is said:

"The government may take real estate for a postoffice, a courthouse, a fortification, or a highway; or in time of war it may take merchant vessels and make them part of its naval force."

The Court of Claims has said:

"There was a military necessity that some land in that vicinity should be taken. There is always a necessity when property is taken, and it implies no wrong on the part of the government that it does take property without the consent of the owner. Underlying the exercise of the right is grant of power upon the expressed condition that compensation be made." Alexander v. United States, 39 Ct. Cl. 383, 396.

So far then as these statutes authorize the seizure of land, vessels, manufacturing plants, food, coal, or mines for government use, they are clearly a constitutional exercise of the power of Congress to appropriate private property for public use.

2. The constitutionality of the guaranty of the price of $2 a bushel for wheat for the crop of 1918, coupled with the power vested in the President to make a similar guaranty of the price for wheat during other seasons which may be covered by the existing war, raises a different question.

This wheat is not necessarily to be taken or purchased for the necessities of the Army or Navy or any other branch of the government. The legislation is based upon the theory that the raising of wheat is beneficial to the people as a whole. It is enacted to obviate the danger there would be of a lack of sufficient wheat to supply ourselves and our allies if production were not stimulated by offering a guaranteed price to all farmers who shall raise wheat.

Just how this guaranty is capable of enforcement is not entirely clear. The President is authorized to buy up the wheat if necessary in order to effectuate the guaranty. If, however, the government does not buy the wheat and the farmer is compelled to dispose of it at a lower price than that guaranteed, it would seem that the only remedy he has is to sue the government for the balance of the guaranteed price. This seems to be contemplated by the clause of the Food Act which permits the President to purchase wheat "whenever he deems it essential in order to protect the government of the United States against material enhancement of its liabilities arising out of any guaranty under this section."

Can the government thus constitutionally guarantee the producer of wheat a minimum price for his wheat and be subject to a liability for the difference between the guaranteed price and the lower price which may be all the farmer may be able to obtain from a purchaser?

Perhaps in time of peace the answer would be in the negative. The provision, however, is strictly a war measure. The action of the President is to be taken only when a war emergency exists. The ef-

fective duration of the whole act is limited to time of war (§§ 1, 24).

It is well to recall that the constitutional power of Congress to pay bounty of two cents a pound on the production of sugar in a time of profound peace was sustained by the Supreme Court. United States v. Realty Co. 163 U. S. 427, 41 L. ed. 215, 16 Sup. Ct. Rep. 1120.

It is true that the question in that case was on the constitutionality, not of the original sugar bounty act, but of a supplemental act for paying past claims for sugar bounty accruing before the repeal of the original act. If, however, the power to pay such a bounty out of the public treasury was sustained in time of peace, it seems difficult to deny the constitutional power to stimulate production of a food supply urgently needed by ourselves and our allies, by guarantying the producer a minimum price for his product.

3. The provision of the 25th section of the food act for fixing the price of coal and coke presents the most difficult question of constitutionality of all this legislation.

The President is authorized whenever and wherever in his judgment it is necessary for the efficient prosecution of the war to fix the price of coal and coke, wherever and whenever sold, either by producer or dealer, and to establish rules to regulate the method of production, sale, shipment, distribution, apportionment or storage. The penalty for failure to conform to the price fixed is that the whole plant and business belonging to the producer or dealer may be taken over and operated by the government.

Is the price thus fixed for coal and coke conclusive on the dealer? The act provides "that if the prices so fixed, or if, in the case of taking over or requisitioning the mines or business of any such producer or dealer the compensation therefor as determined by the provisions of this act be not satisfactory to the person or persons entitled to receive the same, such person shall be paid seventy-five per centum of the amount so determined, and shall be entitled to sue the United States to recover such further sum as added to said seventy-five per centum will make up such amount as will be just compensation."

Is it within the power of an executive officer to fix a compensation to be charged not only to the government but to purchasers, and then seize the property if the owner will not accept it?

This question will probably come before the courts and ultimately to the bar of the Supreme Court of the United States. Perhaps the best guide to what is likely to be the ultimate decision of that high tribunal will be found in a reference to some of its past decisions. These will probably be more useful than for the present writer to venture his own opinion on this difficult question.

In the historic series of cases, known as the Granger Cases, the Supreme Court forty years ago laid down the rule that it was within the power of legislatures, state or national, to fix charges for the use of private property wherever such property is "affected with a public interest." The regulation there was of charges for the use of grain elevators (Munn v. Illinois, 94 U. S. 113, 126, 24 L. ed. 77, 84).

The same question came up again twenty-five years later, again involving grain elevators.

Here, however, the court said that the power of legislatures to fix charges was "subject to the proviso that such power of limitation or regulation is not without limit, and is not a power to destroy, or a power to compel the doing of the services without reward, or to take private property for public use without just compensation or without due process of law. The court said that it had no means, 'if it would under any circumstances have the power,' of determining that the rate fixed by the legislature in that case was unreasonable, and that it did not appear that there had been any such confiscation of property as amounted to a taking of it without due process of law, or that there had been any denial of the equal protection of the laws" (Budd v. New York, 143 U. S. 547, 548, 36 L. ed. 256, 257, 4 Inters. Com. Rep. 45, 12 Sup. Ct. Rep. 468).

The analogy of the statutes fixing the charges of grain elevators with the one we are considering fixing the price of grain, coal, etc., is obvious.

Recently the Supreme Court has ex-

plained its doctrine as to business "affected with a public interest," by saying "that a business, by circumstances and its nature, may rise from private to be a public concern and be subject, in consequence, to governmental regulation." "The underlying principle is that business of certain kinds holds such a peculiar relation to the public interests that there is superinduced upon it the right of public regulation" (German Alliance Ins. Co. v. Lewis, 233 U. S. 394, 411, 58 L. ed. 1013, 1021, L.R.A.1915C, 1189, 34 Sup. Ct. Rep. 612).

In time of war it is obvious that supplies of food and fuel, not only to the government but to corporations and private individuals, may make all the difference between losing and winning the war. Clearly, therefore in time of war, if at no other time, the business of supplying food and fuel is "affected with a public interest."

It does not follow that the power of a purely legislative body or of a commission acting under it is unlimited. On the contrary, the courts have repeatedly recognized that this power must stop short of confiscation.

In 1894, the Supreme Court said (Reagan v. Farmers' Loan & T. Co. 154 U. S. 362, 399, 38 L. ed. 1014, 1024, 4 Inters. Com. Rep. 560, 14 Sup. Ct. Rep. 1047):

"It has always been a part of the judicial function to determine whether the act of one party (whether that party be a single individual, an organized body, or the public as a whole) operates to devest the other party of any rights of person or property. In every constitution is the guarantee against the taking of private property for public purposes without just compensation. The equal protection of the laws which, by the 14th Amendment, no state can deny to the individual, forbids legislation, in whatever form it may be enacted, by which the property of one individual is, without compensation, wrested from him for the benefit of another, or of the public. This, as has been often observed, is a government of law, and not a government of men, and it must never be forgotten that under such government, with its constitutional limitations and guaranties, the forms of law and the machinery of government with all their reach and power, must in their actual workings stop on the hither side of the unnecessary and uncompensated taking or destruction of any private property, legally acquired and legally held."

The legislation which we are considering while it permits prices to be fixed and operation of mines regulated, and allows the government to seize the mines and operate the property in case of departure from the price or violation of the regulation, does preserve the right of the mine owner to a decision of a judicial tribunal, as to the reasonableness of the compensation.

Former Supreme Court Justice Hughes in a recent address to the American Bar Association, on "War Powers Under the Constitution" (Senate Document No. 105, 65th Congress, 1st Sess. p. 13) said:

"The extraordinary circumstances of war may bring particular business and enterprises clearly into the category of those which are affected with a public interest and which demand immediate and thoroughgoing public regulation. The production and distribution of foodstuffs, articles of prime necessity, those which have direct relation to military efficiency, those which are absolutely required for the support of the people, during the stress of conflict, are plainly of this sort. Reasonable regulations to safeguard the resources upon which we depend for military success must be regarded as being within the powers confided to Congress to enable it to prosecute a successful war."

According to this high authority, there is little ground for questioning the constitutionality of this legislation as a whole. If, however, in any detail the Food and Fuel Control Act should be found to have overstepped the Constitution, none of the rest of the act will be affected.

Section 22 of the Act declares:

"That if any clause, sentence, paragraph, or part of this Act shall for any reason be adjudged by any court of competent jurisdiction to be invalid, such judgment shall not affect, impair, or invalidate the remainder thereof, but shall be confined in its operation to the clause, sentence, paragraph, or part thereof, directly involved in the controversy in which such judgment shall have been rendered."

Questions of Value.

The value of property taken by the government for public use is a judicial question to be decided by the courts. Most of the statutory provisions, recently enacted, make it so in express terms by providing that where an owner is dissatisfied, he may accept part of the compensation awarded him and sue for the rest.

It is very difficult to lay down any gen-

eral rule for deciding a question depending upon so many elements as that of value.

The circumstances giving rise to the present legislation are so unprecedented that each question of value must be settled separately as it arises. All that we can do is to give some extracts from decisions of the Supreme Court of the United States laying down general principles on these questions of valuation.

These principles being thus authoritatively laid down are binding upon all Federal tribunals so long as they remain unmodified by the high tribunal by which they were first announced.

In the great case involving gas rates in New York (Willcox v. Consolidated Gas Co. 212 U. S. 42, 53 L. ed. 395, 48 L.R.A.(N.S.) 1134, 29 Sup. Ct. Rep. 192, 15 Ann. Cas. 1034) that court said:

"The value of real estate and plant is to a considerable extent matter of opinion, and the same may be said of personal estate when not based upon the actual cost of material and construction. Deterioration of the value of the plant, mains, and pipes is also to some extent based upon opinion. All these matters make questions of value somewhat uncertain," etc.

In a case decided in 1879, Mississippi & R. River Boom Co. v. Patterson, 98 U. S. 403, 407, 408, 25 L. ed. 206, 208, the court laid down this rule as to valuing land taken for public purposes:

"In determining the value of land appropriated for public purposes, the same considerations are to be regarded as in a sale of property between private parties. The inquiry in such cases must be, What is the property worth in the market, viewed not merely with reference to the uses to which it is at the time applied, but with reference to the uses to which it is plainly adapted; that is to say, What is it worth from its availability for valuable uses? Property is not to be deemed worthless because the owner allows it to go to waste, or to be regarded as valueless because he is unable to put it to any use. Others may be able to use it, and make it subserve the necessities or conveniences of life. Its capability of being made thus available gives it a market value which can be readily estimated.

"So many and varied are the circumstances to be taken into account in determining the value of property condemned for public purposes, that it is perhaps impossible to formulate a rule to govern its appraisement in all cases. Exceptional circumstances will modify the most carefully guarded rule; but as a general thing, we should say that the compensation to the owner is to be estimated by reference to the uses for which the property is suitable, having regard to the existing business or wants of the community, or such as may be reasonably expected in the immediate future."

This was explained in a later case (New York v. Sage, 239 U. S. 57, 61, 60 L. ed. 143, 146, 36 Sup. Ct. Rep. 25) by the same court as meaning:

"What the owner is entitled to is the value of the property taken, and that means what it fairly may be believed that a purchaser in fair market conditions would have given for it in fact—not what a tribunal at a later date may think a purchaser would have been wise to give, nor a proportion of the advance due to its union with other lots."

In the case from which we have previously cited on the constitutional question involved (Monongahela Nav. Co. v. United States, 148 U. S. 328, 329, 341, 37 L. ed. 468, 469, 473, 13 Sup. Ct. Rep. 622):

"How shall just compensation for this lock and dam be determined? What does the full equivalent therefor demand? The value of property, generally speaking, is determined by its productiveness—the profits which its use brings to the owner. Various elements enter into the matter of value. Among them we may notice these: Natural richness of the soil as between two neighboring tracts—one may be fertile, the other barren; the one so situated as to be susceptible of easy use, the other requiring much labor and large expense to make its fertility available. Neighborhood to the centers of business and population largely affects value. For that property which is near the center of a large city may command high rent, while property of the same character, remote therefrom, is wanted by but few, and commands but a small rental. Demand for the use is another factor. The commerce on the Monongahela river, as appears from the testimony offered, is great; the demand for the use of this lock and dam constant. A precisely similar property, in a stream where commerce is light, would naturally be of less value, for the demand for the use would be less. The value, therefore, is not determined by the mere cost of construction, but more by what the completed structure brings in the way of earnings to its owner. For each separate use of one's property by others, the owner is entitled to a reasonable compensation; and the number and amount of such uses determine the productiveness and the earnings of the property, and therefore largely its value. So that if this property, belonging to the Monongahela Company, is rightfully where it is, the company may justly demand from everyone making use of it a compensation; and to take that property from it deprives it of the aggregate amount of such compensation which otherwise it would continue to receive."

"So, before this property can be taken away from its owners, the whole value must be paid; and that value depends largely upon the

productiveness of the property; the franchise to take tolls."

"In the case at bar there is no such reservation; there is no attempt to destroy property; there is simply a case of the taking by the government, for public uses, of the private property of the Navigation Company. Such an appropriation cannot be had without just compensation; and that, as we have seen, demands payment of the value of the property as it stands at the time of the taking."

These general principles will undoubtedly be followed and applied in the many novel conditions created by our entrance into the present conflict, and by the wide range which has been given to the powers of the government by the legislation we are considering.

Courts in Which Suit Is to Be Brought.

The statutes which we have been considering repeatedly provide for an award of compensation by administrative authority, and if that is not a satisfactory payment the party entitled may accept 75 per cent and sue for such additional sum as will make up "just compensation." These provisions are in slightly different language, but the following is typical:

"If the compensation so determined be unsatisfactory to the person entitled to receive the same, such person shall be paid 75 per centum of the amount so determined by the President, and shall be entitled to sue the United States to recover such further sum as, added to said 75 per centum, will make up such amount as will be just compensation, in the manner provided by § 24, ¶ 20, and § 145 of the Judicial Code."

Section 145 of the Judicial Code, here referred to, provides that the Court of Claims shall have jurisdiction to hear and determine—

"All claims founded upon the Constitution of the United States or any law of Congress, upon any regulation of an Executive Department, upon any contract, express or implied, with the government of the United States, or for damages, liquidated or unliquidated, in cases not sounding in tort, in respect of which claims the party would be entitled to redress against the United States either in a court of law, equity, or admiralty if the United States were suable."

Section 24, ¶ 20, gives to the United States District Courts jurisdiction concurrent with that of the Court of Claims in all such claims not exceeding $10,000.

The Court of Claims consists of five judges, sitting at Washington, all the judges participating in the hearing and decision of each case.

The District Courts consist of one judge each, sitting at a central point in the district, the smaller states constituting one district, and the larger ones divided into two, three or four districts.

Both in the Court of Claims and in the District Courts all suits against the United States are tried by the court without a jury. Judgments rendered by either the Court of Claims or the District Courts are, within certain limitations as to amount, subject to appeal to the Supreme Court of the United States.

Chief Justice Chase, giving a decision of the Supreme Court of the United States in a case decided in 1872, said (United States v. Klein, 13 Wall. 128, 144, 145, 20 L. ed. 519, 524, 525):

"It was urged in argument that the right to sue the government in the Court of Claims is a matter of favor; but this seems not entirely accurate. It is as much the duty of the government as of individuals to fulfil its obligations. Before the establishment of the Court of Claims claimants could only be heard by Congress. That court was established in 1855 for the triple purpose of relieving Congress, and of protecting the government by regular investigation, and of benefiting the claimants by affording them a certain mode of examining and adjudicating upon their claims. It was required to hear and determine upon claims founded upon any law of Congress, or upon any regulation of an executive department, or upon any contract, express or implied, with the government of the United States. Originally it was a court merely in name, for its power extended only to the preparation of bills to be submitted to Congress.

"In 1863 the number of judges was increased from three to five, its jurisdiction was enlarged, and, instead of being required to prepare bills for Congress, it was authorized to render final judgment, subject to appeal to this court, etc. . . . Since then the Court of Claims has exercised all the functions of a court, and this court has taken full jurisdiction on appeal.

"The Court of Claims is thus constituted one of those inferior courts which Congress authorizes, and has jurisdiction of contracts between the government and the citizen, from which appeal regularly lies to this court."

In a case decided only as recently as 1915, the Supreme Court speaks of "the great act of justice embodied in the jurisdiction of the Court of Claims," and adds that it is quite inadmissible to hold that "the jurisdiction of the Court of Claims is to be construed strictly and read with an adverse eye." United States v. Emery, B. T. Realty Co. 237 U. S. 28, 31, 59 L. ed. 825, 827, 35 Sup. Ct. Rep. 499.

The Supreme Court has said in another case (United States v. O'Grady, 22 Wall. 641, 647, 648, 22 L. ed. 772–774):

"Judgments of the Court of Claims where no appeal is taken to this court, are, under existing laws, absolutely conclusive of the rights of the parties."

Also,

"It is quite clear that Congress cannot subject the judgments of the Supreme Court to the re-examination and revision of any other tribunal or any other department of the government."

And again,

"That the judgment of the Court of Claims, from which no appeal is taken, is just as conclusive under existing laws as the judgment of the Supreme Court," etc.

Hence by the decisions of the Supreme Court judgments of the Court of Claims, whether appealed from or not, are final and conclusive upon the United States. They are so treated by Congress. They are reported by the Secretary of the Treasury to Congress at each session, and provision is made for their payment in the regular deficiency appropriation acts.

While a number of provisions of the statutes which we have been discussing provide expressly that a party dissatisfied with the compensation offered has a remedy in the Court of Claims, the right to sue in that court would exist even if no such provision were contained in the act.

Wherever a case arises under an act of Congress, the Court of Claims has power to award what the party is entitled to under the act.

Where the law provided that in certain cases "the Secretary of the Interior shall cause to be repaid to" certain persons excess fees and commissions on purchases of public lands, the Supreme Court held that the case was "founded upon a law of Congress," and for that reason the party had a right to sue in the Court of Claims if he could not obtain redress from the Secretary of the Interior. Medbury v. United States, 173 U. S. 492, 43 L. ed. 779, 19 Sup. Ct. Rep. 503.

So, again, where an act of Congress provided "that the proper accounting officers be, and they are hereby, directed to settle and adjust to" the widow of a certain Army officer "all back pay and emoluments that would have been due and payable," the Supreme Court held the action of the accounting officers was not a finality, and the party if dissatisfied could resort to the Court of Claims for a larger allowance in case that made by the accounting officers was unsatisfactory. McLean v. United States, 226 U. S. 374, 57 L. ed. 260, 33 Sup. Ct. Rep. 122.

Testimony in cases in the Court of Claims is taken out of court before a notary public or some other officer appointed for the purpose and is reported to the court in typewriting, and is, in important cases, generally printed.

The expense and inconvenience of bringing witnesses from distant points to Washington is saved by a provision that testimony "shall be taken in the county where the witness resides, when the same can be conveniently done." (Judicial Code, § 167.)

The proceedings in the District Courts follow the same general course as those in the Court of Claims.

Conclusion.

The legislation which we have been considering marks a great improvement upon the method of taking private property in former wars.

Rarely, if ever, have acts been passed providing systematically for the taking of private property for war purposes and providing in the legislation itself for a proper ascertainment of "just compensation."

During the Civil War private property, both personal and real, was appropriated on a vast scale; but, for the most part, without express legislative authority.

As the jurisdiction of the Court of Claims at that date was practically similar to what it is to-day, some of the persons whose property was seized for military use brought suit in the Court of Claims. Before, however, any of these cases came to trial, the jurisdiction of the court was taken away by an unfortunate provision of legislation contained in the Act of July 4, 1864 (13 Stat. at L. 381, chap. 240, Rev. Stat. §§ 300 A & B, 1059, ¶ 4, Comp. Stat. 1916, §§ 469, 470), which provided that the jurisdiction of the Court of Claims should not extend to cases growing out of the destruction or appropriation of, or damage to, property by the

army or navy, engaged in the suppression of the rebellion.

The examination of claims for property taken for Army use was committed by this act to heads of bureaus of the War Department. These were Army officers without legal training or capacity, without machinery for securing evidence upon which alone the claims could be properly adjudged, and so occupied with administrative duties that even with the capacity they would have lacked the time and attention to devote to the settlement of these claims. The result was as unsatisfactory as should have been expected.

Ultimately, the jurisdiction of the Court of Claims was restored, though only to the extent of reporting the allowances for the legislative action of Congress. Bowman Act March 3, 1883 (22 Stat. at L. 485, chap. 116), Tucker Act, March 3, 1887, § 14 (24 Stat. at L. 507, chap. 359, Comp. Stat. 1916, § 1142). The awards of the Court of Claims under these statutes, however, did not take the form of judgments, but only of a report for the information of Congress. Most of them were after much delay paid under special appropriations made by Congress for the purpose.

The legislation passed with respect to the seizure of private property in the present war proceeds upon much sounder principles. Most of the acts expressly provide that where an adjustment by the executive officers has proved unsatisfactory, the Court of Claims, and, to a limited extent, the United States District Courts, shall have jurisdiction to adjudicate the amount of compensation. The decisions of these courts take the form of judgments subject to appeal to the Supreme Court; and payable without undue delay by appropriation made in the regular appropriation acts of each session of Congress. While the scope of the war powers of the government is, by the legislation we have been considering, carried to a point beyond anything heretofore known, it is also accompanied with a distinct advance in the protection of the rights of the citizen to the "just compensation" promised by the 5th Amendment.

George W. Kirchwey

Sonnets of a Young Lawyer

Up Against His First Demurrer.

I.

I tried a case to-day before Judge Brown,
He sat there very cool and very stern;
His crust I tried to pierce at every turn,—
He only drummed his fingers up and down.
Full many a case I cited of renown;
I spoke to him in words I meant should burn;
Blackstone I quoted, Coke, and even Fearne,
But nothing would remove his savage frown.
He seemed a bit displeased at me, I thought,
Or rather looked with favor on my foe.
Would all my nights of labor come to naught,
And I reap nothing from this case but woe?
Yet, if my subtle reasons he but caught,
It looked as if I ought to have a show.

II.

My argument was ended in a squeak;
The other fellow ill concealed a grin.
He seemed to think that he was bound to win.
In deep tones then the judge began to speak:
"At first complainant's case looked rather weak;
Demurrer that defendant had put in
Seemed good; on second thought, when I begin
To think, of equity there is a streak,
And I must say the bill is good in law;
So this demurrer I shall overrule."
Now, who's the one to give the loud guffaw,
Who is the boy that's all serene and cool?
Old Brown's the finest judge I ever saw;
So always may his Honor wisely rule.

Hampton, Virginia.

John Weymouth.

Stories of the King's Courts

BY WALLIS NASH

Nashville, Oregon

FOR many decades before the new law courts in London gathered all the King's courts, both in chancery and in common law, in one or other of their many and great court rooms, the Lords Justices of the ancient Court of Chancery held their sittings in a small court room in Lincoln's Inn.

Draped with crimson curtains, the scrupulously swept floor covered with heavy matting that deadened all sounds, the old oak paneling, the court created a fit staging for the two white-wigged and silk-gowned judges known as "the Lords Justices."

The two judges had sat thus for many years, respected by all men for their learning, broad-mindedness, and their happy relations with the counsel, both young and old, who practised before them.

The senior judge was Knight-Bruce. He was a short, well-nourished, rosy man, with the complexion of a winter apple. He was short-sighted, and always carried a pair of mother-of-pearl eyeglasses, which he raised whenever his eyes were to be focused anywhere beyond the papers lying on his desk. He possessed a power of sarcasm, only occasionally used, but for which he was feared, especially by the young barristers who practised in that court. His colleague, Lord Justice Turner, was a thin, ascetic looking man, a first-rate lawyer, and was gentleness itself.

The time was the end of the long vacation. After a two months' rest judges and counsel were alike fresh for the labors of the long November term.

The invariable custom of the English bar is to carry into court a clean-shaved face.

The chancery barristers had dined together the evening before the opening of court. Jokes and chaff were rife. One young barrister brought to table a noticeable black beard, the growth of the long vacation.

"Oh, come now, Tom," protested his neighbor, "go to your barber's the first thing in the morning. You know you don't dare to show yourself in court with that blacking brush on your face!" "I won't do any such thing," said Tom. "We are free Englishmen, and surely may wear on our faces what we please!" "Bet you a fiver," said his friend, "you don't dare look Knight-Bruce in the face, when court opens, with that beard!" "Done with you," was the quick response, and the bet was duly noted.

At 10 the following morning, the usher made his historical announcement: "Oyez, oyez, oyez, the Lords Justices' Court is now open!" The bench in front of the court was filled with the Queen's counsel; those next in the rear were allotted to the junior bar. Among his brethren the black-bearded face of our young friend of the previous night was conspicuous.

The Justices took their places and bowed to the standing bar, who then sat down. Justice Knight-Bruce adjusted his eyeglasses and slowly passed in review the ranks of the bar. His gaze stopped at the one bearded countenance. He let his glasses slip—then took out his handkerchief, wiped and readjusted them, and made a fresh survey of the amazed bar. When he came for the second time to the unlucky victim, he stopped, and, falling back to his seat, uttered in a most audible voice, the simple ejaculation—"Good God!" Even Justice Turner smiled, the bar roared, and Tom, blushing to his forehead, pushed his way through his colleagues, and rushed out of the court, doubtless on his

way to the barber's. No more beards were seen in the Lords Justices' Court.

Another branch of the High Court of Chancery is the rolls court, presided over by the master of the rolls. About thirty-five years ago, and for a good many years on both sides of the date now in question, the judge was named Romilly, the son of Sir William, the widely known jurist. The then master of the rolls sat in a dingy court, in a dingier neighborhood east of Chancery Lane, but close to the fine building called the "rolls office," where the antiquities of England by way of records and historical documents are stored for safe custody. In the time I speak of, the master of the rolls court did a very large business, for the judge was industrious and careful, and the members of the bar who practised there were able. Easily the first in ability and in the volume of cases in his hands was Sir George Jessel. He was first solicitor general, then attorney general, then master of the rolls in the court where he had for so long practised, then justice of appeal; in that capacity he revolutionized and simplified the practice of the Court of Chancery. His memory was prodigious. I have known him to speak offhand for a full day, with scarcely one reference to the elaborate brief lying before him.

I had once the charge of a case in the rolls court wherein the title to some land was in question between two brothers. There was bitter enmity between them. Their names were James and John. The case was involved and turned on various small particulars. Sir George Jessel held our brief. The judge was supplied, as usual, with a copy of the brief, which covered a good many pages. Before the opening had gone far I noticed that Jessel was blundering in his statements, and seemed embarrassed. Apparently he had got it mixed; James, not John, was the former being our client. I was sitting just in front of him, and was feeling rather miserable, especially as I saw the judge turning over the brief and reading paragraphs carefully. I could not stand it much longer, and, standing close to the advocate, I whispered, "You have got it mixed, James, not John, was the party to that deed!" But he answered me, "Sit down, I know that, but the man likes to correct me!" Soon the judge did correct him, to some purpose, for, after gratefully acknowledging the interference of the judge, we got on splendidly, and won the case.

Such was a feature in what was whispered about, as "getting the length of the judge's foot," in which Jessel was a master. Nevertheless he was a great lawyer and advocate.

On the common-law side of the Court of Queen's Bench one of the most appreciated advocates was Hawkins, Q. C., afterwards better known generally as the judge who presided in the Tichborne trial, where the imposter Arthur Orton got his deserts.

Sir Henry Hawkins was a small, wiry man, with rather a long nose, a dry complexion, and a keen but kindly blue eye, that was much given to twinkling when the comic side of things presented itself. In his hours of ease jokes and witticisms flowed freely, without preparation. He was the best cross-examiner I ever knew. He led his witness along, by quiet and apparently innocent questions, until, by admission after admission the whole interior of that witness was exposed in open court.

He went the home circuit. Guildford, the county town of Surrey, was the last assize town before the return of attorneys, barristers of the lower bar, and sergeants at law and Queen's counsel to their duties in Westminster Hall. The sessions were over, and the evening train to London was receiving its passengers. The little English compartments were seemingly full when I reached the platform. But one seat was vacant where Hawkins, Q. C., and four other well-known barristers were installed. One of them, seeing my perplexity, and knowing me more or less, called out to me and invited me in. I shall never forget that run into London. Jokes, nonsense, and sense filled the air.

Presently one of the passengers asked Hawkins where he had lodged at that assizes. "Oh, at old Mrs. Brooks's, where I have lodged for the last twenty years, at the old house near the market place," said he, "but I will never go there again.

I have threatened her so many times, but this time I mean it."

"What's the matter?" "I'll tell you. The one thing I can't stand in a lodging is bedbugs. One will keep me awake and spoil my night's rest. Well, last night as soon as I had put out my candle they began to riot all over me. After a bit I got up, put on some clothes, and prepared to spend the rest of the night in the easy chair. But I was so angry with the old landlady that I made up my mind to catch some of those marauders and show them to her in the morning. I looked round, and in my valise was a little medicine bottle, empty and to be thrown away. Just the ticket, I thought. So I turned the bedclothes down, and soon had quite an assortment bottled up. I pictured old Mrs. Brooks's face when she was shown indisputable evidence of my accusation. After a bit it occurred to me that these things were *feræ naturæ*, wild animals, not to be caught and imprisoned, by all the old statutes. What cruelty on my part to bottle them up. So, as I got more merciful as time passed I just turned them all out again, to live their own free lives. But I pity the next man in that bed! I went to sleep in the easy chair with a calm conscience, and slept till day came. So that's the episode of the bedbugs in old Mrs. Brooks's lodgings."

Wallis Nash

Retrospect

A lawyer sat at his desk one night
Thinking of days that were past;
Of the suits he had lost and the suits he had won,
How he had "done" others, and been undone,
And where he was at, at last.

He thought of the case of Aunt Jane Cole
Who had rented her farm on shares,
The "cropper" to have one third and "found,"
The crop to be split right on the ground,
But the "cropper" was taking it all.

He remembered the sage advice he gave,
And how quickly she took the cue,
To go straight home and summon the clan,—
Get every team and boy and man,—
Be in the field by the crack of day.

And before the tenant knew what he's about
Have every blamed ear of corn yanked out
And safely stored where it belonged,
In her spacious granaries, tight and strong.

The scheme worked out to the "heel of a gnat,"
And before the tenant knew where he was at,
Not an ear of corn was left in sight
Of all that was in the field last night.

Aunt Jane declared to her dying day
That a lawyer's advice was the only way,
And was really the best thing she'd ever seen,
And beat to a frazzle a landlord's lien.

J. Wilson Jones.

McLeansboro, Ill.

The Origin of the Writ of Habeas Corpus

BY HARRY S. GLEICK

of the St. Louis Bar

THE writ of habeas corpus is of hazy origin and gradual evolution, and its early history is not a matter of general knowledge.[1] That it was not known before the thirteenth century seems certain. There were, however, certain other writs which were afterwards replaced by habeas corpus, although it cannot be said to have developed from them.

De homine replegiando[2] was a royal writ, directed to the sheriff or gaoler, commanding him to release his prisoner on bail. If the prisoner was held by a private person, who sought to escape the action of the writ by eloigning[3] the prisoner, this person himself could be imprisoned by a capias in withernam.[4] But the value of de homine replegiando was seriously impaired by the fact that the sheriff was ordered to replevy the prisoner "nisi captus fuerit per speciale præceptum nostrum." Moreover, it was a royal writ, and thus did not offer a very substantial guaranty of personal liberty.

The writ de odio et atia, as described by Bracton,[5] also bears a resemblance to habeas corpus. If a man was imprisoned upon an "appeal of homicide," the writ was directed to the sheriff to hold an inquest, and if the man was imprisoned through "hatred and malice" he was to be released on bail, provided twelve men of the country would guarantee his appearance before the justices. At the beginning of the thirteenth century this writ was very popular, but it gradually fell into disuse.

The writ of mainprise was a writ ordering the sheriff, or others with authority, to bail a prisoner imprisoned for felony, provided that the accused offered sufficient security.[6]

Strange as it may seem, habeas corpus in the beginning was issued for the purpose of putting persons into prison, rather than as a means of getting them out. It was in existence, as a part of the law of procedure, in the reign of Edward I.[7] It was making its way into the law in the form of a capias; after the summons, which was the first step, a capias ad respondendum was issued to the sheriff, ordering him "to have the body" of the defendant on a given day before the court. Second and third summonses were termed alias and pluries writs, respectively. If these proved ineffectual, the process of outlawry might be resorted to, and a capias utlagatum obtained. This ordered the sheriff to have the outlaw before the justices at Westminster on a given date. Capias ad satisfacien-

[1] The author desires to acknowledge the use of the following valuable articles: Edgar L. Masters, "Suspension of Habeas Corpus," 7 Ill. L. Rev. 15; Edward Jenks, "The Story of Habeas Corpus," 18 Law Quarterly Rev. 64; C. C. Crawford, "The Writ of Habeas Corpus," 42 Am. L. Rev. 462.

[2] "For replevying a man."

[3] Hiding the prisoner in a distant country.

[4] A writ ordering the seizure of a person "in withernam;" i. e., by way of reprisal.

[5] De legibus Angliæ, fol. 123, vol. 2, 1879 ed. p. 292.

[6] The foregoing writs are described in 3 Blackstone's Commentaries, chap. 8, 128–138; also in 1 Holdsworth, History of English Law, 95ff.

[7] The contention that certain sections of Magna Carta contain an acknowledgment of the principles of habeas corpus is probably not sound. Magna Carta, it is true, recognizes the iniquity of arbitrary imprisonment. But the writ of habeas corpus originated, as far as we know now, *after* Magna Carta, and even then was not employed to protect personal liberty.

dum was a writ issued subsequent to a judicial hearing, brought about by one of the preceding writs, at which judgment was given against the accused, and was an order "to have the body" of the accused before the justices to satisfy the claim against him. By the end of the fourteenth century these writs were part of the everyday legal processes. The older writs had gradually become almost entirely obsolete.[8]

Further changes took place in the fourteenth century. The writ of habeas corpus cum causa developed. This writ ordered the custodian of the prisoner to have him before the court and show the cause of the arrest and detention.

Habeas corpus cum causa was used in the fifteenth century in connection with the writs of certiorari and privilege. Certiorari was a prerogative writ issued by the King's Bench or chancery for removing a case from a lower tribunal. It was issued either upon order of the King, or upon the demand of the prisoner, provided he could show cause why the superior court should try the case. Certiorari, accompanied by a writ of habeas corpus cum causa (or corpus cum causa), was frequently used as a dilatory measure, the defendant obtaining his release on bail. The writ of privilege was used by persons, clergymen particularly, but also members of Parliament and certain others, who were exempt, partly or totally, from trials in the ordinary courts. The writ of corpus cum causa, employed in connection with the writ of privilege, operated to bring the case before the proper tribunal.

These, then, were the uses of habeas corpus during the fourteenth and the greater part of the fifteenth centuries. As yet it was merely an incidental step in legal process. It was available to a prisoner only when he could show that the King's Bench or chancery ought to issue a writ of certiorari, or that he enjoyed a special privilege which granted him immunity from proceedings except in a particular court.

At the end of the fifteenth century habeas corpus was issued in conjunction with the writ of privilege to restrict the growing equitable jurisdiction of the chancellor.

The sixteenth century was what may be termed a period of transition. The writ expanded in scope; it became more than a part of the law of procedure. Gradually the idea of the privilege developed into a means for testing the validity of an imprisonment. Two interesting and important cases occurred towards the end of the century which are evidence of this change. In 1588, in Search's Case,[9] the defendant secured a discharge from custody by means of a writ issued by the Court of Common Pleas. In the same year, the same court, in Howel's Case,[10] issued a writ of habeas corpus commanding the marshal of Marshalsey to "have the body" of Howel before the court on a specified day and show reasons for his detention. In the end, however, the writ afforded no relief, because it was issued on the order of the Privy Council. The court had to concede that the King, or the Privy Council as a whole, could cause an arrest to be made without assigning a reason. Nevertheless it is apparent that habeas corpus was developing more and more into the instrument that we are familiar with.

The cases above mentioned led to the Resolution in Anderson of 1592, in which the judges maintained that, upon presentation of a writ of habeas corpus even in such cases, the gaoler must produce the prisoners. Remedy did not actually come in such suits until the next century, but habeas corpus had now become independent of certiorari and privilege. In 1603, for instance, in the case of Thomas Shirley, a member of Parliament, the prisoner was released by means of habeas corpus, whereas in former days a writ of privilege would have been required.

The Five Knights' Case (Darnel's

[8] These writs are mentioned, as Jenks aptly states, "not because it is contended that any one of them is in itself the famous weapon of political warfare, but that we may be warned to look for the origin of that weapon, not in vague assertions of the liberty of the subject, but in what seems to be . . . a wholly unlikely quarter, viz., that process of arrest on mesne process, which was . . . one of the great scandals of our legal procedure."

[9] Leon. pt. 1, p. 70, 74 Eng. Reprint, 65.
[10] Leon. pt. 1, p. 71, 74 Eng. Reprint, 66.

Case) [11] of 1627 brought up the question of the power of the King arbitrarily to arrest a subject. "Per speciale mandatum regis" was the only reason assigned in a warrant signed by two members of the Privy Council, issued for the arrest of Thomas Darnel and four others. An effort to obtain their release by habeas corpus failed, the court of King's Bench advancing no reason beyond declaring that action had been taken at the command of the King. The decision was a correct one according to the existing laws and precedents, but it aroused public opinion, and in the following year, during proceedings in Parliament relating to the liberty of the subject, Selden declared before the House of Lords: "In all cases, my lords, where any right or liberty belongs to the subjects by any positive law, written or unwritten, if there were not also a remedy by law for the enjoying or regaining this right or liberty where it is violated or taken from him, the positive law were most vain. . . . And in the case of right and liberty of person, if there were not a remedy in the law for regaining it, when it is restrained, it were of no purpose to speak of laws, that ordain it should not be restrained." Selden also speaks of the writ as "the highest remedy in the law for any man that is imprisoned." The result of the feeling in Parliament was the section of the Petition of Right which was intended to abolish arbitrary imprisonment. The King grudgingly, and, as it afterwards turned out, insincerely, signed the Petition.[12]

In 1629 the case of the Six Members involved a direct violation of the Petition of Right, six members of Parliament being arbitrarily imprisoned by order of twelve Privy Councilors, the King himself signing the warrant. It is true that this power was reserved to the King in cases of high treason, of which there were seven classes, but the attorney general was forced to use strained constructions of the law in a rather feeble attempt to justify the action taken in the case of the Six Members. The Crown gained no permanent advantage from this case. The representatives of the people had become so insistent that sooner or later a more efficient statute was certain to come.

The question was one of the first taken up by the Long Parliament after it assembled in November, 1640. In the bill abolishing Star Chamber it was provided that the court of King's Bench or Common Pleas should issue without delay a writ of habeas corpus to a person committed by order of the King or Privy Council, and should determine, three days after the return, the validity of the imprisonment, and deliver, bail, or remand the prisoner, according to the law.

In 1668 a bill to prevent the refusal of habeas corpus was reported in the lower house and reached a second reading. One of the charges in the articles of impeachment against Clarendon in the preceding year had been that he had caused "divers of his Majesty's subjects to be imprisoned against the law, thereby to prevent them from the benefit of the law." In 1670 the Lords killed a similar bill. The Commons continued the struggle, which became increasingly bitter, and in 1673 and 1674 two more bills were passed, and another in 1675. The House of Lords, prejudiced in favor of the King (Charles II.), took no action.

The situation was fast approaching a climax, but the King did not realize it. The famous Jenkes's Case, in 1676, shows this. Jenkes, a linen draper, arbitrarily imprisoned for making a speech in Guildhall which displeased the King and his officials, was unable to obtain release on bail. The chancellor denied his application for a writ of habeas corpus because the court of chancery was not in session. In the following year Lord Shaftesbury, together with three other peers, was arrested by order of the Lords for words spoken in a debate. The charge was that he was guilty of high contempt for calling into question the legal continuance of Parliament after a prorogation of more than twelve months. The judges of King's Bench refused to release him upon a writ of habeas corpus, alleging that they could not inquire into the commitment by the House of Lords of one of its members. When Shaftesbury was

[11] 3 How. St. Tr. 1.
[12] 2 Hallam, Const. Hist. of Eng. 1893 ed. p. 382.

finally released, by order of the Lords, he became author of the famous act of 1679, and it was due chiefly to his efforts that the act was passed. There was now a change of feeling in the House of Lords. In 1677 a bill "for the better security of the liberty of the subject" originated in that body and reached a second reading.

In 1679, after a series of debates and conferences, the habeas corpus act reached its final form.[13] On the eve of an election for a Parliament which was to act upon the Exclusion Bill, the King signed the act, because he did not dare to veto it. Without going into details, it is sufficient to point out that the efforts of Parliament to restrict the power of the King, after the long struggle with the Stuarts, led to two important results: The ancient remedies were re-enacted in thoroughly unmistakable and emphatic language, and the scope of the writ was somewhat broadened. It was now an effectual remedy against improper imprisonment in practice as well as in theory.

Harry S. Gleiss

[13] 31 Car. II. chap. 2.

Uniform Schedule of Charges

Perhaps the most serious difficulty in the average law office, as I have been privileged to learn of them, is the absolute lack of a uniform schedule of charges which is made the basis of all bills rendered by the office. While it is true that the average attorney does not willingly or intentionally do injustice to one client, as compared with another, by charging the one a higher fee for services than he charges for similar services to the other, nevertheless I have met a very large number of men who have no fixed or definite scheme of charges, but who, in making up their bill, take into consideration principally the ability of their client to pay. This is a consideration, but it should not be the only one. It is not difficult to determine a basis for charges which is not only not arbitrary, but is satisfactorily exact and easily explained. In the first place the practitioner must have gone through his period of study and, whether he obtained his legal education in a college or university or in the office of some older attorney, his period of preparation means an investment of several thousand dollars in time and money. Upon this investment he is entitled to a fair return. This is one of the elements upon which his charges should be based. Another is his investment in office furniture, and in library,—an investment which amounts to a considerable item even in the most modestly equipped office, and in many offices involves an expenditure of thousands of dollars. Still another item is the overhead expense of running an office,—the cost of clerks and stenographers, the rent, heat and light, telephone, stationery, postage, and similar charges. Finally, comes the consideration of the question of the kind of service for which the charge is made, the importance of the matter involved, and the satisfactoriness of the result achieved. The thoughtful practitioner who takes all of these things into consideration can readily complete a schedule of charges under which no case will be handled in his office which does not contribute its share of the interest upon his standard investment, the expense of maintaining his office, as well as a reasonable charge for the services rendered in the premises.—Hon. Lewis W. Bicknell.

The Regress of Legal Morale

BY WILLIAM W. BREWTON

of the Atlanta Bar

Author of a Series of Philosophic Essays on Law

Well assured that their speech is intelligible and the most natural thing in the world, they [the intellectuals] add thesis to thesis, without a moment's heed of the universal astonishment of the human race below, who do not comprehend their plainest argument; nor do they ever relent so much as to insert a popular or explaining sentence, nor testify the least displeasure or petulance at the dullness of their amazed auditory. The angels are so enamored at the language that is spoken in heaven that they will not distort their lips with the hissing and unmusical dialects of men, but speak their own, whether there be any who understand it or not.—Emerson.

Generalization is always a new influx of the divinity into the mind. Hence the thrill that attends it.—Emerson.

I SHALL understand somewhat of human fallacy, if I regard optimism. Truth, the failure in the discernment of which is fallacy, is conditioned in no degree whatsoever by sentiment, but rests universally free within the mental analytic, by which faculty alone it is discerned. So that all opinions of human history and affairs which spring from sentiment, whether optimistic or pessimistic, are invalid; inasmuch as by mental analysis alone may facts and conditions be judged. Pre-posited sentiment to regard any or all human affairs with optimism, or the converse, in no degree at all affects the truth touching those affairs, inasmuch as the status of such truth is already established, and is thus free, independent, and unconditioned. That which is to be judged of is always to be accepted as the conditioning element for all judgment; not the cast of our own minds. Our individual "turn of mind," that is to say, the idiosyncrasy of our sentiments, bears no relation whatsoever to truth, and cannot be a valid condition for it. An optimistic mental cast is as susceptible to error as a pessimistic one. In each case, sentiment rules.

Hence, it is true forever that human progress is differentiable; that is to say, the progress of man is not universal throughout his affairs. Progress in one realm has ever been seen to be attended by regress in another. Military strength and power often spring from the decay of science and religion, which are to arise again only upon the dissolution of the former; and commercialism seems ever to have been the foe of art. Each age chooses which it is to foster and perfect. Gigantic commerce, with diminutive art; military power, attended by the falling away of religious and scientific life,—are keynotes in world history.

But these antitheses are to be regarded as characterizing only the world of human affairs. The optimistic state of mind of a people regarding the affairs of the age in which they live, which is so easily set aside by one of fear and apprehension when those affairs have been disturbed, is in no way to be extended to the great, underlying faculty of judgment which belongs to the human mind; and with howsoever much of optimism man may feel safe at any time in regarding his worldly conditions, it will ever be the analytical faculty of the human mind itself to which he is to periodically turn for an opinion of his state, and a correction of his errors. Human affairs are practical, contingent, inconstant, and uncertain; the mental analytic is abstract, free, universal, and unconditioned. Man's practical world is a realm of effects, results, and particulars; the mental analytic is his realm of general rule. *And for the governing rule for the use of this world of particularities, man can only revert to generalization.*

I. The Regress to Generalization.

The erected world of practical science rests upon formal and abstract concep-

tion. The so-called practical scientist enters upon a course of error whenever he feels free to scout the claims of the scientific philosopher. He who regards only the practical content of science overlooks its abstract form. Generalization is the *form* which is to envelop, and upon which is to be based, the *content* of science. *A priori* conception precedes and is posited behind *a posteriori* conclusion. *A priori* conception is universal, illimitable, and valid; error arises in *a posteriori* conclusion. The erection of scientific content is upon an *a priori form*, which is the guide for the empirical erection. So that the philosopher precedes the practical scientist. The former discovers to the world the possibilities of the human mind in a given field; the latter constructs the available material of the world within the formulæ of such possibilities. Neither is to disregard the importance of the other.

But scientific *form* and *content* are distinct departments, and neither conditions the other. Each realm is free and independent of the other; with the distinction that, while mental forms are independent among themselves, practical human affairs are contingent upon each other. Practical objects and human affairs are contingent among themselves, while independent of the mental analytic, which offers a governing principle only as those affairs are referred to it for judgment. And because the world concerns itself most with practical objects, rarely ever disturbing itself with reflection, and because the discoveries of generalization are reserved to the intellectual elect, few and aloof, science suffers itself to become attached to all of those errors which spring from unguided exploitation. The validity of the intellect as a guide for science is recognized by few; the value of the principles which are fundamental, general, and unattached to current, practical error, is not understood by the world at large. But so certain of his valid attainments is the master of generalization that he never lowers their exalted fixture in exchange for popular acceptance. The world is to revert to the abstract philosopher for inquiry and study; he is never to be found burnishing truth with superficial color. And truth attained is, within itself, higher reward and satisfaction for him than may be had from popular understanding of its alternative in the form of mediocrity.

And so science is to constantly revert to generalization for a new infusion of truth into its content. The errors arising from the association of the numerous contradictory objects in the practical field of science are thereby expurgated. From a regress to generalization, a new and clearer vision of scientific organization is to be had, and the improperly joined objects of science are thereby placed upon proper principles. The periodic, and even constant, reversion to the *form* of science gives new life and direction to the organization of its *content*. The general principles under which the object-matter of a science is subsumed are to be at least periodically reverted to and regarded, in order that new life may be given the science through its purging and reorganization. To incorporate within a science a range of external matter, without regard to the applicability of the general and original principles of the science to such object-matter, is to insure the means to error. To turn again to generalization at constant periods is the means by which science is to know the truth regarding its nature, ends, and purposes.

The law, of all the sciences, is the most distinctly marked by two separate and independent realms. Howsoever dominant the practical realm may be as regards other sciences, in the case of the law generalization is of first importance. For legal form is that realm of the law which represents justice and right. Justice, we shall always remember, is a formal condition of the mind, and is never to be regarded as a practical object. But inasmuch as the practical world of affairs is a fundamental and necessary department of the law, generalization joins and co-operates with it in composite legal science,—the purpose of legal science in the world being to administer justice to human affairs and relations. The degree of success to which man has attained in relating the two realms, of themselves free and independent, marks the status of the law in the

world of progress. And regarding this status of validity or *morale* of the law in the world, we assert that: *Legal morale is the adjustment of legal form and content; the more adequate the adjustment, the higher the morale.*

II. Morality, the Form.

The formal condition for all law is morality. Morality is the *a priori* conception which conditions the justice of all laws, inasmuch as it is itself justice. Morality is an intellectual form, an ethical category. It rests free and independent within the mental analytic itself, and inseparable from the illimitable and uncaused abstract. It is form, and not substance. Regardless of the progress of human affairs, morality is immutable forever. There is only one science in the world for which it is the formal condition, and that science is the law. The form for all law, then, is not susceptible to error; or, if it be so susceptible, none shall know it, save the Supreme Being; inasmuch as morality is a form or concept of God which man cannot affect or alter. The world of practical objects is capable of being impressed and influenced by man, but not so with morality. It is the formal condition for all law because it is man's conception of justice and right, which indeed precedes all construction of legal science. The *a priori* realm of the law, thus, is more readily discernible than the abstract condition for any other science, inasmuch as morality may be regarded as the most prominent of all conceptions of the mind. Hence, the form for law, more readily than the form for any other science, is capable of being adjusted to its content; the nature of which adjustment determines legal morale.

III. Expediency, the Content.

From the world of human relations is derived the content of *the law.*[1] *The world* of expediency, which is the world of experience, offers all of the practical facts and relations which the law is to regard; and the practical relations of the world compose the content, or object-matter, of the law. Justice is achieved for man when the practical affairs of his life have been brought in contact with the *a priori* principle,—morality. The one science which performs this great office is the law. The success which it has attained in this endeavor determines legal morale.

IV. The Regress of Legal Morale.

Just as is the case with all sciences, the law is to revert constantly to generalization for a new infusion of truth and validity Abstraction is to be made of the content, and the pure form regarded, that the guiding validity of the original and underlying principles of the law may be observed anew. The law's ever-flowing fountain of truth is morality,—the abstract form within the human mind which never changes. For a determination of the moral status of a given law, we revert to the principles underlying the law which have sprung from morality. The practical objects and purposes of the law in question are not regarded, but these are abstracted from our consideration, and we turn to our own formal, moral judgments in determining the morale, or moral status, of such a law. The practical relations of the world, which legal science is bound to embrace, but which are the source of whatever degree of error legal science may hold, are capable of affecting, and do affect, the law's morale; though these can never disturb the principle, morality. The inadequacy of the adjustment of legal form and content lowers legal morale, to correct which it becomes necessary that legal morale regress to the general and abstract form, morality. Inasmuch as legal morale has to do with both legal form and content,—with both morality and the practical world of affairs,—it is capable of being lowered in direct proportion to the extent to which the complex human relations and objects within the law have succeeded in obscuring the law's appreciation of pure justice and right. Legal morale is then to retrace its steps to the realm of for-

[1] The author's method, in preceding essays, of regarding *morality* and *expediency* as the two fundamental elements and departments of the law, is not to prevent our making the distinction that the former is the *form*, and the latter the *content*, of the law.

mal right, returning to morality for new inspiration and control. The balance of control is thenceforward to be in the hands of morality until the moral status of the law shall have been rightly raised to that plane where all of the objects and human relations within the law shall have received new life and justice from the fountain of legal truth.

And so the law, above all the sciences, is never to disregard the claims of generalization. Pure right and justice are themselves posited within the realm of formal truth, and are themselves that *morality* which is the form for all law, and to which the law, as a composite science, is to regress for new life and truth.

William W. Brewton.

Must the Lawyer Increase His Fee?

For years the average American lawyer has been drifting along, apparently content with his lot, and with the fees customarily paid for his services. In some places, however, the cost of legal services has been somewhat advanced by alert members of the local bar, acting by common consent. It is also noticeable that the commercial forwarding associations have made an increase in the fees allowed for collections. Such tendencies as these should be encouraged. The average lawyer is underpaid, and is working at a great disadvantage in this day of steadily advancing prices.

The expense of maintaining the average law office has been gradually increased in recent years and is now higher than ever before. Office rent, stenographic assistance, heat, light, and,—most important of all,—law books, the working tools of the lawyer, are costing more.

The lawyer's personal and home expenses have kept pace with the upward tendencies of his office expenses. The increase in the price of food and clothing alone is an important item that cannot be overlooked. Yet, in spite of these added burdens, the lawyer generally is struggling along as best he may without making an effort to obtain increased fees. So little has he thought of protecting himself that at times he has allowed the question of fees to be taken out of his control by his state legislature. The lawyer looks carefully and faithfully after his client's business, but is often a poor business manager where his own affairs are concerned; in fact, his stenographer is frequently the real business manager, and a very good manager, too.

The fee question must be met squarely. The lawyers should get together and arrange for increased fees. There is absolutely no argument against greater compensation. Justice to self and to those dependent upon him—the primal law of self-preservation—impels the lawyer to take this step. The general public expects it and the time is ripe. Practically all other organizations, professional or trade, have met a similar issue and have made the necessary adjustment.

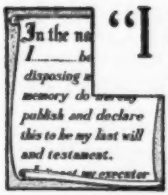
This is the day of great things. Historic events of world magnitude fill the daily press. Industries are striving to meet almost unlimited demands. The resources of commerce are taxed to the utmost. Governmental regulation or control of business affairs is widely extended as a war necessity. Our industries will operate with ever-increasing intensity and will need legal advice frequently. Consultation fees will be much larger than in the past and will be earned, by reason of the greater demands that will be made upon the lawyer's time and energy.

Every field of legal effort must yield increased remuneration if the lawyer is to meet the demands made upon him in these unprecedented days.—Charles A. Zweng.

A Parthian Legacy

BY MARVIN LESLIE HAYWARD

of the Hartland (N. B.) Bar



"I AM getting old now," sighed John Edney. "My life is a very lonely one, and I would like to have some of my own kin near me." "Of course, uncle," agreed Mary, "I would like to do anything I could to please you; but it is a great surprise that you should want me to live with you. Our families have never been intimate, and father always felt that you did not use him right about the Morris legacy. In fact," she added truthfully, "shortly before he died he warned me never to trust you in any business matter."

"We were both to blame in those days," Edney murmured soothingly, "but why can't we let bygones be bygones. You come and live with me, brighten the evening of my life with your cheery presence, and I'll leave you well provided for. And it may not be for long," he added pathetically, but with a cunning gleam in his miserly eyes.

"I would like to come, uncle, if you think it would suit you. But there's Harold; we are engaged, you know," she added.

"How much's he worth?" snapped Edney.

"He hasn't much ahead," admitted Mary, "but he has a good salary, and we were planning on being married next year."

"And try the old experiment of 'love in a cottage,'" he sneered. "Better accept my proposition and I'll not bother you long. Then with a $10,000 legacy from me you will be in a position to start married life without the handicap of poverty."

Mary hesitated. "Don't you think you owe some duty to your own people?" he pleaded. "I'm the nearest living relative you have left, and I'm not asking you to make any real sacrifice by giving up your projected marriage for a few years. It will brighten up my old life more than I can tell you, and the legacy I shall leave you will be some slight recompense for what you could no doubt call your wasted time."

"I'll have to think it over," she demurred as she thought of Harold's evident disappointment.

Harold's opposition was certainly far more strenuous than even she had anticipated.

"What," he expostulated, "live with that old miser for two or three years, run his house, look after the servants, put up with his petty meanness, and postpone our marriage in the meantime. Why, it can't be thought of."

"But he is so old and lonely," pleaded Mary.

"What made him old," fumed Harold, "but gloating over his money, and anyone as disagreeable and malicious as he is must expect to be lonely."

"But he promised me a legacy of $10,000," she persisted, "and with that we could certainly start married life on a different scale from our former plans."

"Well," retorted Harold, "if you think that John Edney is going to so far forget himself as to keep his word you are much mistaken. Why, his business associates wouldn't take his word for a dollar."

"I'm not used to hearing my relatives criticized in that fashion," she remarked icily, admitting to herself at the same time that she had often heard her father express the same opinion of his brother.

"Oh, well," he declared, "if you care more about the promise of a legacy from John Edney than for me I suppose there's nothing more to be said."

"And if you are as selfish as that," she replied, "there certainly isn't."

Harold turned from his desk as his client entered.

"Why, Mary," he exclaimed.

"Surprised to see me, no doubt," she suggested.

"And delighted too, I assure you," he declared. "But what can I do for you?"

"You remember that matter of uncle's will," she suggested shyly.

It seemed to him that for the past three years he had remembered nothing else.

"I could hardly forget it when it broke our engagement and robbed me of the only girl I ever loved," was the reply that trembled on his lips, but when he spoke it was in the professional tone of a busy attorney.

"Let me see," he mused, "as I remember it you were to live with him, and in return he held out a certain hope of a $10,000 legacy, did he not?"

"I suppose you are aware he died last month?" she queried.

"Yes, I saw the announcement in the paper, and presume he neglected to leave you the promised legacy."

"Your presumption is correct," Mary replied coldly.

"If I remember the decision in Alderson v. Maddison,[1] correctly," replied Harold, "you have a good action against his estate for the amount of the legacy."

"I don't care about the legacy," she hastened to reply, "but I wanted to consult you about a clause in the will," and she handed over a certified copy of the document.

"The fourth clause," she explained.

"'Whereas,'" he read, "'my niece Mary has for the past three years lived with me in the position of a housekeeper, and during that has had the handling of my money for various purposes, and, like her father before her, has stolen large portions thereof, I therefore leave the said Mary Edney the sum of $1 in full for all claims against my estate.'"

"The old scoundrel," he exclaimed,—"not satisfied with breaking his agreement, he takes this fiendish method of having the last word and gets the statement on the records of the court."

"I should have known better," she admitted; "but I could even forgive him for the references to myself, if he hadn't traduced father's memory as well."

"Sue him," said Harold, "enter suit against his estate for damages for libel."

"Mr. Lewin, our family attorney, advised me," said Mary, "that I could sue the estate and recover the $10,000 legacy that he promised me, but I refused. I felt that, if uncle didn't care to keep his word, I was not going to go to law about it."

"Mr. Lewin was perfectly correct from a legal standpoint," replied Harold, "and while I sympathize with your feelings in the matter, still these libelous statements in the will are different, and you ought to make his estate dance for it."

"That's the way I feel about it," agreed Mary, "and I told Mr. Lewin so, but he said we couldn't do anything, and quoted something about *actio personalis moritur cum persona*, if I remember the Latin correctly."

"Meaning that 'a personal action dies with the person,'" explained Harold. "That is, if you have a right of action against a party personally, that right cannot be enforced against his estate after his death; but that rule doesn't apply to a case like this, and there is no doubt that you could recover a substantial verdict."

"I will leave it to you," declared Mary; "and you can start a suit if you wish; but don't actually bring it to trial, for I wouldn't go into court under any circumstances."

The next day Harold issued a writ against the estate of John Edney, setting forth the statements contained in the will and claiming $20,000 damages; and Harry Powell, the attorney for the estate, called on Harold for a consultation in regard to the matter.

"Of course I don't uphold Edney for putting those statements in the will," admitted Powell, "for we all know they are false, but all you can do in this suit is to show up Edney's nasty disposition, for you will surely lose."

"We will show up Edney's character," retorted Harold, "and at the same time recover a substantial verdict against his estate."

"Nothing like being sure," laughed

[1] L. R. 5 Exch. Div. 293, 49 L. J. Exch. N. S. 801, 43 L. T. N. S. 349, 29 Week. Rep. 105.

Powell; "but unfortunately for you the law is the other way."

"That's news to me," declared Harold.

"You surely know that old maxim which lays down the principle that 'personal actions die with the person,'" replied Powell patronizingly.

"It is all right to know the maxim," retorted Harold; "but it is also necessary to know when the maxim applies, and if you look up the point you will find that it does not apply to libelous statements contained in a will, although it may apply to other libels written by the deceased in his lifetime."

"What authority have you for that proposition?" demanded Powell.

Harold took down a volume from the bookcase and opened to a marked page.

"In the case of Harris v. Nashville Trust Co." he said,[2] "the court was called to decide exactly the same point which will arise in this case, and held that the estate of the deceased was liable for damages for a libel contained in the will. The court discussed very fully the application of the maxim, *Actio personalis moritur cum persona,* and decided definitely it does not apply to a case of defamatory statements made in a will.

"'To return now to consideration of the maxim, *Actio personalis mortur cum persona,*'" read Harold. "'Translated and grammatically confined, this principle does not touch the present case. To say that an action dies with the person, or, as Lord Mansfield rendered it, "is buried" with the person, implies that the cause of action existed in the lifetime of the person; that it was existing while the person lived and abated with his death. The right of action here asserted never had any existence during the lifetime of the deceased, and it did not accrue until the publication of the libel, made by the probate of the will, after the testator's death. That is, the right of action arose after the testator's death and could not have been buried with him.'"

"Let me look at that case a moment," said Powell, and he rapidly shot down the page indicated.

"That does put a different light on the matter," he admitted, "and we will possibly settle without suit. I will take it up with the trust company, who are the executors, and communicate with you."

"Remember that I am willing to accept a check at any time for $10,000 in full settlement and withdraw the suit," said Harold.

A few days later Mary called at the office, and Harold handed over the trust company's check for $10,000, which she promptly indorsed payable to the order of the trustees of the Memorial Hospital.

"What does that mean?" demanded Harold.

"It means," replied Mary, "that I wouldn't touch a cent of uncle's money that he did not give me willingly, and this check will furnish a ward in the hospital in memory of my father."

"But it means more than that," declared Harold. "It means that I can ask you to renew our broken engagement without the possibility of the suspicion that I cared for the money."

"Yes, admitted Mary, "I had thought of that too."

M. K. Haymond

[2] 128 Tenn. 573, 162 S. W. 584, Ann. Cas. 1914C, 885, 49 L.R.A.(N.S.) 897.

Editorial Comment

Case and Comment

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Thousands of Lawyers Offer Services to United States

ACCORDING to a Washington despatch in the New York Journal of Commerce—

Several thousand lawyers have offered their services to the Judge Advocate General's Department. Many have volunteered to leave their homes and their professional business, and serve without office, commission, or pay. Proper military organization and proper governmental policy, and the statute law itself, all tend to prohibit the general acceptance of these offers. The Army can avail itself of such offers only to a limited extent and for special service. But the spirit that prompts them is worthy of the highest appreciation of the department, the Army, and of the public. About 150 lawyers have been commissioned in the grade of major and judge advocate, and are now serving in the Army.

In time of peace the Judge Advocate General's Department consisted of but twelve officers. It now consists of more than twelve times that number. The department is the official legal adviser of the entire military establishment. Under and for the Secretary of War, it is the judge of the legal correctness of all military administration, all disciplinary action, and of all matters affecting the rights and mutual relationship of the personnel. It is its duty to advise the Secretary of War and the Commander in Chief as to what the law is and whether military administration is lawfully conducted.

As a court of last resort, to which all general court-martial records are referred for examination and revision, is the Judge Advocate General at the head of the entire military judicial machinery. With a trained lawyer upon the staff of each division commander exercising court-martial jurisdiction, and with the final revision in the office of the Judge Advocate General at Washington, there is little opportunity for the exercise of military power oppressively or unlawfully. The Judge Advocate upon the staff of the division commander or army commander supervises disciplinary action in the first instance, and the office of the Judge Advocate General exercises a supervisory power similar to a court of errors over all general court-martial jurisdictions throughout the Army.

By regulations promulgated by the President of the United States on November 8, he calls upon the governor of each state to appoint legal advisory boards, each to consist of three lawyers, whose main purpose it shall be to advise registrants with respect to their rights. There should be one such advisory board for each local exemption board, and there are nearly 4,700 of such boards in the United States.

The response to the suggestion of the President has been enthusiastic in all parts of the country. "Our lawyers will not be lacking when called on for help, but will respond to a man," is the sentiment everywhere.

The women lawyers of the country are displaying a patriotic spirit rivaling that of their professional brethren.

The Women's Bar Association of Kansas City, the first legal fraternity of women in Missouri, was organized on November 8, to extend the work of women in the legal profession in war relief work.

A set of resolutions stated the organization is to give free legal advice and assistance to women and girls who are financially unable to engage the services of attorneys, and especially to the women dependents of men engaged in military service.

England May Disfranchise Conscientious Objectors

THE House of Commons on November by a vote of 200 to 171, adopted an amendment to the electoral bill disfranchising conscientious objectors to war.

In the debate, which lasted throughout the afternoon, Andrew Bonar Law, Chancellor of the Exchequer, announced that the government did not desire to influence the House in any way on the question, but that it would leave the members free to vote as their consciences dictated.

Strong advocates on behalf of the objectors to the amendment were not lacking. Lord Hugh Cecil entered an objection on the ground that the amendment would set up a law of the state superior to moral law. Leifchild Jones declared the spiritual home of the amendment was Germany. Arnold Rowntree and others who opposed the amendment said it was inconsistent to disfranchise many Quaker objectors who were doing valuable work of a nonmilitary character in France. If this were a war to end war, they said, that was exactly what the objectors were doing.

Several members urged some sort of discrimination and time limit to the disfranchisement, and it is understood that at a subsequent stage of the bill an effort in this direction will be made, especially in favor of objectors engaged in mine-sweeping and ambulance work.

Liquidation of German Insurance Companies

ALL Teuton insurance companies in the United States, excepting life, were, on November 26, ordered liquidated by Secretary of the Treasury McAdoo. The life insurance companies are confined to continuing existing contracts, and financial transactions of the liquidated concerns are placed under alien property custodian A. Mitchell Palmer's control.

The action was a blow at German insurance companies.

"The consideration of safety is so important," declared the statement, "as to render it unnecessary to determine at this time whether this action is also demanded by other considerations incident to the successful prosecution of the War.

"In these circumstances, I am convinced that the best interests of the country will be served by the liquidation of these companies under the direction of their American management and subject to such regulations as the Secretary of the Treasury may from time to time prescribe."

The Army and Navy Insurance Law

A DIVISION of military and naval insurance of the Bureau of War Risk Insurance has been organized as a part of the Treasury Department, and is in active operation. It has been ruled that members of officers' training camps are under the act, and can obtain insurance. The benefits of the law are available to all of the members of the United States Army, Navy, and Nurses' Corps.

A short summary of some of the main features of the law follows:

Premiums for a $10,000 policy begin with $6.30 per month at ages 15, 16, and 17; increase to $6.40 per month for the ages 18, 19, and 20; to $6.50 per month for the ages 21, 22, and 23; to $6.60 per month for the ages of 24 and 25; to $6.70 per month for the ages of 26 and 27; to $6.80 per month for the age of 28; to $6.90 per month for the ages of 29 and 30; to $7 per month for the age of 31, with progressive increases for ages above those given. The minimum amount of insurance that may be taken out is $1,000.

The compulsory allotment to a wife or children, which is separate from the insurance, shall not be less than $15 a month, and shall not exceed one half of a man's pay. A voluntary allotment, subject to regulations, may be as large as the

insured desires, within the limits of his pay.

In addition the government will pay monthly allowances as follows:

Class A. In the case of a man to his wife (including a former wife divorced) and to his child or children:

(*a*) If there be a wife but no child, $15.

(*b*) If there be a wife and one child, $25.

(*c*) If there be a wife and two children, $32.50, with $5 per month additional for each additional child.

(*d*) If there be no wife but one child, $5.

(*e*) If there be no wife but two children, $12.50.

(*f*) If there be no wife but three children, $20.

(*g*) If there be no wife but four children, $30, with $5 per month additional for each additional child.

Class B. In the case of a man or woman, to a grandchild, a parent, brother, or sister:

(*a*) If there be one parent, $10.

(*b*) If there be two parents, $20.

(*c*) For each grandchild, brother, sister, and additional parent, $5.

In the case of a woman, to a child or children:

(*d*) If there be one child, $5.

(*e*) If there be two children, $12.50.

(*f*) If there be three children, $20.

(*g*) If there be four children, $30, with $5 per month additional for each additional child.

If the man makes an allotment to certain other dependent relatives the government will also pay them an allowance which may equal the allotment, but this shall not be more than the difference between $50 and the allowance paid to the wife and children.

The increased compensation in case of death runs from a minimum of $20 monthly to a motherless child, or $25 monthly to a childless widow, to a maximum of $75 monthly to a widow and several children. The widowed mother may participate in the compensation.

In case of total disability the monthly compensation runs from a minimum of $30, if the injured man has neither wife nor child living, to a maximum of $75 if he has a wife and three or more children living, with $10 a month extra if he has a widowed mother dependent upon him.

The maximum is enlarged still further, for when the disabled man constantly requires a nurse or attendant $20 monthly may be added. If the disability is due to the loss of both feet, both hands, or total blindness of both eyes, or if he is helpless or permanently bedridden, $100 monthly is granted.

The law contemplates future legislation for re-education and vocational training for the disabled. It gives them full pay and their families the same allowance as for the last month of actual service during the term of re-education.

General Pershing and thousands of other officers and tens of thousands of soldiers have already taken out insurance. Up to date policies of insurance have been issued aggregating $1,032,938,000.

Alien Enemy Property

HONORABLE A. Mitchell Palmer, a former member of Congress from Pennsylvania, who was appointed by President Wilson custodian of alien enemy property for the duration of the War, under the Trading with the Enemy Act, has issued the following statement as to his duties as Alien Property Custodian:

Reports have appeared in the press with regard to the plans and purposes of the Alien Property Custodian with respect to the property of aliens residing in the United States, which have caused unnecessary and ill-founded alarm. This alarm has led in some localities to heavy withdrawals of postal savings and bank deposits. Many of the published statements concerning this very important matter are so misleading as to give rise to the fear that they may have originated in a deliberate wish to disturb and injure American business interests, and not in mere mistake.

The statement most calculated to mislead and cause uneasiness is to the effect that the fact as to whether anyone is an enemy or the ally of an enemy under the terms of the Trading with the Enemy Act recently passed by Congress is determined by nationality or citizenship. This is not the fact. The principal test of enemy character under the act of Congress is one of residence or place of business connections, rather than nationality or citizenship. A subject of Germany or of

any of Germany's allies residing in this country, even though he has made no declaration of his intention to become a citizen, is permitted to continue in trade and commerce and in the possession and control of his property while he remains in the United States and obeys its laws, and he is not regarded as an enemy nor placed in that category by the Trading with the Enemy Act.

The broad purpose of Congress as expressed in the Trading with the Enemy Act is: First, to preserve enemy-owned property situated in the United States from loss; and, secondly, to prevent every use of it which may be hostile or detrimental to the United States.

Commerce cannot, of course, be carried on between residents of countries that are at war. In the absence of a general law for the protection of money and property in the United States belonging to those who are under legal disability, there might, without the special action of Congress, have been very considerable property loss and deterioration. The property of every person under legal disability is in every civilized country protected by the appointment of trustees or conservators whose duty it is to administer and care for the property while the disability exists.

This is the duty of the Alien Property Custodian. He is charged by law with the duty of protecting the property of all owners who are under legal disabiliy to act for themselves while a state of war continues.

The Trading with the Enemy Act authorizes in certain cases a license to permit enemy-owned business to be carried on. Where such license is not applied for or is not granted, the Alien Property Custodian is directed to exercise in regard to enemy-owned property the well-defined authority of a common-law trustee. Thus the probable waste and loss of a great deal of valuable property and property rights which could not, while the war continues, be conserved by the enemy owner is avoided, and a trustee appointed and paid by the United States is charged with the duty of protecting and caring for such property until the end of the War. This is his function. There is of course no thought of the confiscation or dissipation of the property thus held in trust.

A further warning to the holders of property and securities in the United States belonging to enemies or aliens of enemies within the meaning of the Trading with the Enemy Act was issued by Mr. Palmer on November 30. He said:

Every corporation incorporated within the United States, and every unincorporated association or company or trustee or trustees within the United States, issuing shares or certificates representing beneficial interests, must transmit to the Alien Property Custodian, before December 5th, a full list, duly sworn to, of every officer, director, or stockholder known to be, or whom the representative of such corporation has reasonable cause to believe to be, an enemy or ally of enemy resident within the territory, or a subject or citizen residing outside of the United States, of Germany or its allies, together with the amount of stock or shares owned by each such officer, director, or stockholder, or in which he has any interest.

On or before the same date, all persons in the United States who have or hold, or have custody or control of, any property belonging to the enemy or ally of enemy, or any person whom they may have reasonable cause to believe to be an enemy or ally of enemy, and all persons who are indebted in any way to the enemy or alley of enemy, or any person whom they may have reasonable cause to believe to be an enemy or ally of enemy, shall make a full report of the facts by a written statement under oath. Blank forms for the making of these reports may be obtained on application to the Alien Property Custodian, Sixteenth and P. streets, Washington, D. C. For the convenience of the public, forms are being sent to many banks and trust companies in the leading cities of the country. Such banks and trust companies will, I am sure, be glad to serve the country in this work by helping persons to make proper reports to this office.

The impression seems to gain ground that there will be custodians for enemy property appointed in each state. No provision is made by the law for such officers, and none will be appointed. The custodian will, however, designate depositaries in a large number of cities in the country to handle bonds, stocks, and other securities and property under the direction of the Alien Property Custodian. These depositaries will collect incomes and make such payments out of the same for administrative expenses, taxes, insurance, etc., as the custodian shall approve, making quarterly reports of their transactions to this office, and remitting the net income at periodical times. These depositaries may be either banks, trust companies, or other suitable depositaries, but the cases of individual depositaries will be very rare. It will be the policy of the custodian to designate as depositaries for particular estates, banks, and trust companies where the properties belonging to these estates are now located, so as to interfere as little as possible with the present method of management of enemy property. Thus, a bank or trust company, which now holds enemy property, after it has made a report thereof, will be designated by the custodian as a depositary for that same property, its work in the future in connection therewith being the same as in the past, except that it will report and account to the Alien Property Custodian, instead of the enemy. There will be no general depositary in one city or state for all property in that locality, and there will be no branch offices of the Alien Property Custodian anywhere. All the business

will be done by the home office in Washington, using the large facilities offered by the banks and trust companies of the country.

Many cases have arisen where property in this country is held for American citizens temporarily residing in the enemy or ally of enemy territory. Such persons, under the law, come within the enemy or ally of enemy class, but whether the custodian will require their property to be delivered to him will depend upon the circumstances in each particular case. When the reports of such cases are all in, the Alien Property Custodian will determine the status of such persons under the law, and the policy of this office in relation to them. To aid in determining these questions, it is probable that a public hearing will be granted, when all persons interested may present their views. Such hearing will not be held for some weeks, however. In the meantime all property of such persons should be reported.

Burial at Sea

APPARENTLY the first case concerning burial at sea is Finley v. Atlantic Transport Co. 220 N. Y. 249, 115 N. E. 715, L.R.A.1917E, 852, which holds that a steamship company which embalms the body of a passenger who dies on a voyage towards his home country is bound to transport the body to port and deliver it to those entitled to its possession for burial, and is liable in damages in case it buries the body at sea. This decision rests on the situation as presented by the complaint and demurrer, which was that the body was sufficiently embalmed by the carrier to render safe its transport to port, and that, while in this condition, the day before reaching port it was cast into the sea.

It would seem clear that, apart from express contract, there is no duty to embalm. But in this case, inasmuch as the body had been embalmed the court observes: "At the time of the burial at sea the body could have been carried to port without injurious effect. Had the steamship been passing through the harbor of New York and approaching its dock, it could scarcely be said that the defendant would be justified in casting the body into the water, from whence it could not be reclaimed, thereby depriving the next of kin of the solace of giving the body a decent burial on land."

The court further remarks: "The plaintiff had a legal right to the possession of the body for burial, and any unlawful interference with that right was an actionable wrong. The right preserved to the plaintiff was a common-law right, and the direct and proximate consequence of an actionable wrong is a subject for compensation. Whenever there is a breach of a contract or the invasion of a legal right the law infers some damage. Larson v. Chase, 47 Minn. 307, 310, 28 Am. St. Rep. 370, 50 N. W. 238, 14 L.R.A. 85. In that case the action was to recover damages for the unlawful mutilation and dissection of a dead body; the only damages claimed being mental anguish, suffering, and nervous shock. Such damages were held properly recoverable. The case of Larson v. Chase was cited and approved in Darcy v. Presbyterian Hospital, 202 N. Y. 259, 263, 95 N. E. 695, Ann. Cas. 1912D, 1238."

The dearth of authority on the subject is referred to in the note accompanying this decision in L.R.A.1917E, 852, where it is said: "One case indeed mentions burial at sea. There the court said, in sustaining a conviction for throwing into a river a dead body which was afterwards found: 'Even on the ocean, where the usual method of sepulture is out of the question, the occasion is marked with all the respect which circumstances will admit.' Kanavan's Case, 1 Me. 226. And there is a statute providing that death on board ship must be entered in the log book (U. S. Rev. Stat. § 4290, Comp. Stat. 1916, § 8036)."

Saving Human Capital

THE struggle of nine of the warring countries to strengthen their human resources by making labor conditions tolerable for children who must work, and by providing schools to teach them how to do better work, are recounted in "Child Labor in Warring Countries," a brief review of foreign reports just issued by the National Children's Bureau.

The prospect for better industrial education for England has lately been strengthened by the bill introduced in the British Parliament by Mr. Herbert Fish-

er, president of the board of education The bill fixes the compulsory school attendance age at fourteen without the present exemptions, and requires that all working children under eighteen spend at least 320 hours a year in continuation schools.

In Italy, as well as in France and England, standards of labor protection were relaxed at the beginning of the War only to be restored and strengthened as experience showed that long hours, night, and Sunday work, with their evil effects on health and efficiency, did not pay.

And Russia, according to information received since the bulletin went to press, has found it necessary to withdraw the power given her minister of labor and industry early in the War to grant exemptions to concerns doing war work from the laws regulating hours and the employment of women and children under seventeen.

Canada, New Zealand, and Australia have maintained practically unchanged through three years of war strain their high standards of protection for working children.

Free Transportation of Police

THE provision of N. J. Act of May 26, 1912 (Pamph. Laws, p. 235) requiring street railway companies to grant free transportation to police officers when in uniform or on duty, is held a constitutional exercise by the legislature of its police power in State v. Sutton, 87 N. J. L. 192, 94 Atl. 788, Ann. Cas. 1917C, 91, L.R.A.1917E, 1176.

The object expressed by the language of the statute in question being one that the legislature may lawfully accomplish under its police power, the court further refused to declare the statute to be unconstitutional upon the ground that the purpose of the legislature was to exact from the public utilities a money tribute in violation of constitutional principles: First, because the purpose of the legislature is known to the courts only in so far as it appears in the object expressed by the language of its enactment; and, second, because, in dealing with the language of an enactment, the courts adopt, if possible, that construction which will sustain the statute as a valid act of legislation.

In Sutton v. New Jersey, 244 U. S. 258, 61 L. ed. 1117, P.U.R.1917E, 682, 37 Sup. Ct. Rep. 508, the United States Supreme Court, in affirming the judgment of the New Jersey court of appeals, above referred to, said: "Freedom to come and go upon the street cars without the obstacle or discouragement incident to payment of fares may well have been deemed by the legislature essential to efficient and pervasive performance of the police duty. Increased protection may thereby inure to both the company and the general public without imposing upon the former an appreciable burden. If any evidence of the reasonableness of the provision were needed, it could be found in the fact that such officers had been voluntarily carried free by the company and its predecessors for at least eighteen years prior to July 4, 1910, when the practice was prohibited by the Public Utilities Act." The Supreme Court also held specifically that the requirement that city detectives not in uniform be carried free on the street cars when in the discharge of their duties was not an arbitrary or unreasonable exercise of the police power.

Readers' Comments

Marriage by Telephone

[We publish, by permission, the following letter addressed by a Georgia attorney, to an officer in a training camp in the state of New York, concerning the validity of the marriage ceremony performed over the telephone between such officer while he was in the state of New York and the bride was in Georgia.]

To Lieut. J. C. T.—

Dear Sir:—

You will please pardon my congratulation coming at this late day, but I wish to take this method of extending to you congratulations for having won the bride who was willing to marry you, although you had, as it seemed at that time, only a few more hours to spend in the land of America.

The Baptist minister here called on me for legal advice as to performing a marriage over the telephone, stating to me that the bride to be was here in Bainbridge, and that you were at that place.

An investigation of the Georgia authorities showed that the marriage license must be granted where the female resides; that the party officiating must, under penalty, have the writ before he can perform the ceremony. Since the girl was here, and you could all be heard over the telephone,—the contracting parties, the witnesses, and the party performing the ceremony,—I saw no legal reason why the marriage could not be performed as was desired, making two hearts glad, and perhaps setting a precedent in American jurisprudence, so far as marriages are concerned.

I stated to him that the marriage could, as I viewed the matter, be questioned only in the event of the right of inheritance, and I believe any jury in any state in the Union would, under such circumstances, render a verdict in favor of the marriage, and I am sure any judge in this or any other state would find enough law, coupled with patriotic sentiment, to render a judgment favorable to the course of holding your marriage valid.

With every good wish to you both, and may Providence bring you safely back to the jewel you have won, I beg to be,

Yours very truly,

H. G. Bell

Bainbridge, Ga.

Federal Direct Tax

Editor CASE AND COMMENT:—

Shall the "capitation or other direct tax" clause of the Constitution be amended to permit a Federal direct general property tax to be levied and collected (in peace and war) in connection with state and municipal taxes, under a uniform and highly-perfected tax system?

I desire to ascertain, if possible, if there are any sound objections to this proposition, and I would like to hear from you relative to it, or from any subscriber, if you will publish this inquiry in your letter box.

The reasons for the amendment seem so obvious and abundant, that they need not be enumerated in this note.

Yours very truly,

H. Halderson

Newman Grove, Neb.

Expert Testimony

Editor CASE AND COMMENT:—

Reading the article in 24 CASE AND COMMENT, 477, on the evils of expert testimony is not convincing that the remedy suggested will bring practical results. The independent research of the lawyer, in behalf of the rights of his client for facts and methods to prove them, is about the most perfect method devised by man. I am sure in a contest as to valuation of property the present legal method of investigation approaches the ideal. In insanity cases the mind of man must be considered, something which has been a riddle to all men in all ages past. No wonder, therefore, the learned, as well as those who have made no study thereon, should have different views on the subject; in fact, what others would call foolish. Lodge of England, a great and learned man, believes in spiritualism, and clearly has seen its manifestation. Others of equal learning ridicule such an idea. I have in mind a noted case in Iowa where most of the experienced and educated physicians considered a man, under investigation as to his sanity, sane; yet all his immediate associates and friends of long acquaintance were sure his mind was unsound. The court decided in favor of the evidence produced by the experienced physicians. Subsequently, it was universally agreed the man was insane. This illustration perhaps proves that the most practical solution of this manifestation of the mind is by the observations of those knowing his normal acts.

Brown McCrary.

Carroll, Iowa.

Among the New Decisions

The law is the last result of human wisdom acting upon human experience for the benefit of the public.—Samuel Johnson.

Brokers — contract for service — mutuality. While an agreement by an owner that a broker shall have the exclusive agency to find a purchaser for his land, for a fixed time, upon certain conditions, is unilateral when made, the element of mutuality is held to be supplied in Braniff v. Baier, 101 Kan. 117, 165 Pac. 813, annotated in L.R.A.1917E, 1036, when the broker accepts its performance by spending time and effort in doing the things that it was contemplated would be done by him under the agreement, and thereafter it is a binding obligation upon both.

Carriers — duty to intoxicated passenger on wrong train. A carrier which accepts as a passenger an intoxicated person who boards a train not scheduled to stop at his destination, it is held in Fagan v. Atlantic Coast Line R. Co. 220 N. Y. 301, 115 N. E. 704, L.R.A.1917E, 663, may be found to be negligent in removing him from the train in the dark, and seating and leaving him on a plank beside the track, out of sight of the station building at his place of destination, which will render it liable in case he is killed by another train, in attempting to reach a place of shelter.

Commerce — interstate — distribution of advertising matter. A city, it is held in the Colorado case of Pueblo v. Lukins, 164 Pac. 1164, annotated in L.R.A.1917E, 699, cannot require payment of a license tax as condition to the distribution by a nonresident representative of a foreign manufacturer who keeps his goods in another state, and ships them only on orders of local merchants of samples and recipe books among the residents of the municipality in accordance with his contracts with purchasing merchants, since such tax would be an interference with interstate commerce.

This decision appears sound in view of the interpretation of the ordinance in question as a revenue measure. However, a different conclusion has been reached in cases where the ordinance or statute was construed as merely a proper exercise of the police power.

Constitutional law — appropriation act — judicial power. An attempt by the legislature to direct a county to levy a tax of a certain amount for the reimbursement of sureties on a collector's bond, who are alleged to have paid such amount to the county as settlement of a shortage for which the collector was not responsible, is held to be forbidden in the Maryland case of Harris v. Allegany County, 100 Atl. 733, by a constitutional provision separating the powers of government and forbidding anyone exercising the functions of one department to assume or discharge the duties of any other.

Whether a statute requiring a county or municipality to pay a claim against it

is an invasion of the powers of the judiciary is discussed in the note accompanying the foregoing decision in L.R.A. 1917E, 824.

Constitutional law — delegation of powers — authorizing Commission to fix reasonable rates. Conferring upon a Public Service Commission authority, after hearing, to determine just and reasonable maximum rates for transporting passengers and freight, is held in the Missouri case of State ex rel. Rhodes v. Public Service Commission, P.U.R. 1917E, 315, 194 S. W. 287, not an improper delegation of legislative power under a Constitution providing that the general assembly shall from time to time pass laws establishing reasonable maximum rates for the transportation of passengers and freight.

Constitutional law — impairment of contract — disregard of franchise rate — power of Commission — policy. While the West Virginia Commission has power to disregard franchise contracts in fixing rates, the Commission, it is held in Re Chesapeake & P. Teleph. Co. P.U.R. 1917E, 955, will exercise such power with extreme caution so as not to permit a utility to violate its contract unless it clearly appears that the enforcement thereof would either be unconscionable or result in an unjust discrimination.

Contempt — disavowal — effect. Where the contempt consists of personal presence and overt acts, it is held in Carson v. Enis, 146 Ga. 726, 92 S. E. 221, accompanied by supplemental annotation in L.R.A.1917E, 650, that those charged therewith cannot be purged by their mere disavowal of intent, under oath. A traverse of an answer to a proceeding for criminal contempt alleged to have been committed out of the presence of the court is not required, and the court may ascertain by testimony in the usual way whether the facts show that the contemnor be guilty of disobedience of the order of the court.

The common-law doctrine that a person charged with criminal indirect or constructive contempt may purge himself of the charge by an answer under oath has only a limited application at the present time; for it does not apply where the charge of contempt is based upon alleged acts or statements of the respondent which are clearly contemptuous in character. In such a case, the answer of the respondent, although under oath, and denying either the facts charged or an intention to commit contempt, is not conclusive in his favor, but the answer may be controverted and the question determined as one of fact.

Contempt — publication affecting criminal trial. A newspaper which, pending the trial of a criminal case in the city where it is published, publishes facts concerning the past life of accused which are not admissible in evidence and are highly prejudicial to accused, so that, upon their coming to the attention of the jury, the declaration of a mistrial and discharge of the jury become necessary, is held guilty of contempt in Re Independent Pub. Co. 240 Fed. 849, annotated in L.R.A.1917E, 703, under the proviso in the Federal statute that the power of Federal courts to punish for contempt shall not extend to cases except the misbehavior of a person in their presence or so near thereto as to obstruct the administration of justice.

This case has the support of the authorities in its decision that the publication in a newspaper, pending trial, of prejudicial facts concerning accused which are inadmissible in evidence, constitutes contempt.

Contract — for support — personal character. Where a parent conveys real estate to her son, and contemporaneously therewith enters into a contract with the son whereby he agrees to pay to his parent and to each of his brothers and sisters a certain specified sum of money, to furnish the parent each year during her life certain provisions, and to furnish her certain rooms in the dwelling in which to live during the remainder of her life, the contract, it is held in Penas v. Cherveny, 135 Minn. 427, 161 N. W. 150, is for the support and maintenance, and therefore personal to the parent.

This decision is accompanied in L.R.A. 1917E, 655, by a note as to excuse for failure of grantee to perform agreement to support.

Contract — sheriff's sale of real estate — Statute of Frauds. The re-

turn by the sheriff, indorsed on the execution, of the highest bid made at an execution sale of real estate, when considered in connection with the advertisement of the sale, is held sufficient in the North Carolina case of Woodruff v. Piedmont Trust Co. 92 S. E. 496, annotated in L.R.A.1917E, 897, to satisfy the requirements of the Statute of Frauds, that contracts for the purchase of real estate must be in writing.

There seems to be no doubt that an officer's return made upon an execution or order of sale, and filed in the office from which it was issued within the proper time, if sufficiently full and explicit in stating the terms of the contract, is a compliance with the Statute of Frauds and binds the purchaser.

But there has been considerable controversy as to what must be included in the return in order to render it sufficiently full and explicit.

Corporation — charter authority to do business only in other state — effect. A charter authorizing the corporation to do business only in another state is held not so far void in the North Carolina case of Troy & N. C. Gold Min. Co. v. Snow Lumber Co. 92 S. E. 494, as to prevent the corporation which has complied with the laws of the latter state so as to be entitled to do business there from maintaining a suit in its courts to recover possession of real estate there located.

The status of a foreign corporation as affected by the fact that its entire business is done outside the state of its creation is treated in the note accompanying the foregoing decision in L.R.A.1917E, 892.

Corporation — discrimination against minority stockholders. Where such officers, chosen by stockholders representing and owning one half the corporate stock, in collusion with such stockholders intentionally manage and conduct the affairs of the company in the exclusive interests of those so electing them, allow themselves exorbitant salaries, wrongfully exclude the stockholders owning the other one half of the stock from participation in the profits or property of the company, and there is such enmity and hostility between the contending stockholding factions as to render harmonious management of the company impossible, it is held in the Minnesota case of Green v. National Advertising & Amusement Co. 162 N. W. 1056, L.R.A.1917E, 784, that a court of equity may, without statutory authority, at the suit of the excluded stockholders, though the corporation be not insolvent, entertain proceedings to wind up the affairs of the corporation, convert its property into money for distribution to those entitled thereto, and appoint a receiver to conduct the affairs of the concern pending the proceedings.

Corporation — suit by stockholder — money damages. That a stockholder cannot, upon refusal of the corporation to proceed, maintain an action on its behalf to recover money damages such as the statutory penalty for injury caused by conspiracy to create a monopoly, is held in United Copper Securities Co. v. Amalgamated Copper Co. 139 C. C. A. 15, 223 Fed. 42, affirmed in 244 U. S. 261, 61 L. ed. 1119, 37 Sup. Ct. Rep. 509.

This decision is accompanied in L.R.A. 1917E, 1004, by a note on whether a stockholder may maintain an action in the right of the corporation to recover a penalty imposed by the Sherman Act.

Criminal law — witness — remark by court. It is held fatal error in the North Carolina case of State v. Rogers, 91 S. E. 854, annotated in L.R.A.1917E, 857, for the judge to direct defendant as a witness in a criminal case to answer the questions of the prosecutor yes or no, and not to be dodging.

Deed — change of grantee after delivery. The changing of the name of the grantee in a deed after its delivery, and recording it in the new name, is held not to affect the title of the grantee first named, in Carr v. Frye, 225 Mass. 531, 114 N. E. 745, annotated in L.R.A. 1917E, 814.

This decision is in accord with the rule of law established by the overwhelming weight of authority, that no alteration of a deed after it has once been delivered will have any effect upon the grantee's title. It is well settled that changing the name of the grantee in a deed after delivery does not devest the original

grantee of his titlte so as either to invest it in the new grantee or to revest it in the grantor.

Discovery — inspection of premises — power of court. A court of general jurisdiction is held in the Missouri case of State ex rel. American Mfg. Co. v. Anderson, 194 S. W. 268, L.R.A.1917E, 833, to have authority to require a defendant employer to admit plaintiff's employee to his premises with experts and photographers to take measurements and photographs for the purpose of preparing for trial an action for personal injuries, notwithstanding the constitutional provision securing persons from unreasonable searches and seizures.

In this case the order attacked had been made in an action for damages brought against a master by his servant, injured while working at the machine in question. The decision is that the court had inherent power, in the absence of statute, to order the inspection, and that the English courts had had this power. The theory of the inherent power of the court has much to commend it, but it is a modern theory, as will appear from a brief review of the subject of inspection of property and premises in civil cases. In the old law inspection of things other than documents was rarely granted.

Discrimination — free service to new subscribers. Giving three months' free service to new subscribers of residence telephones is held in the Oregon case of Re Home Teleph. & Teleg. Co. P.U.R. 1917F, 260, to constitute an unlawful discrimination under a statute prohibiting a utility from charging any person any greater or less compensation for any service than it charges any other person "for a like and contemporaneous service under substantially similar circumstances."

Discrimination — rates — requiring summer consumer to pay full annual rate. Water rates at a summer resort are held in the Maine case of Briggs v. Peaks Island Corp. P.U.R.1917E, 750, not unjustly discriminatory because they require the summer taker to pay the full yearly rate, where the plant was built for and is measured by the summer demand, and the year-round takers are the incidental consumers.

Elevator — defect — liability for accident. The owner of an apartment house who installs and maintains for use of tenants and their guests, without attendant or warning, an automatic elevator which he knows to be defective, is held liable in the California case of Jacobi v. Builders' Realty Co. 164 Pac. 394, L.R.A.1917E, 696, for injury caused by its attempted use, although it is the best appliance of the kind on the market.

Elevator — negligence in attempted use. One who is familiar with an automatic elevator the door of which in theory cannot be opened if the cage is not at the landing is held not negligent per se in stepping through an open door into the shaft without first looking to see if the cage is in fact there, in the California case of Jacobi v. Builders' Realty Co. 164 Pac. 394, L.R.A.1917E, 696.

Evidence — amount of grain delivered to carrier — conclusiveness. The legislature, it is held in Shellabarger Elevator Co. v. Illinois C. R. Co. 278 Ill. 333, 116 N. E. 170, L.R.A.1917E, 1011, cannot make the sworn statement of a shipper as to the amount of grain delivered to the carrier conclusive, although the carrier refuses to weigh the grain when so delivered.

No other reported case has been found which has considered the constitutionality of a statute which makes a shipper's statement as to weight conclusive. It is in harmony with the well-established rule that the legislature has no power to prescribe rules of evidence which have the effect of denying to a litigant the right to prove his case.

Evidence — opinion as to cause of crime. To impeach a witness who, upon a trial for homicide, testifies to facts tending to show self-defense, it is held in the Texas case of McDougle v. State, 194 S. W. 944, L.R.A.1917E, 930, that the state cannot show that he had previously stated that accused killed decedent because the latter sued him, since such statement is a mere opinion.

Executor and administrator — charging estate for packages for crop. An

administrator, it is held in the Washington case of Lamb Davis Lumber Co. v. Stowell, 164 Pac. 593, L.R.A.1917E, 966, may bind the estate for boxes necessary to market a crop of apples belonging to the estate, under a statute requiring him to take the estate into his possession and allowing him all necessary expenses in the care and management of it.

False pretenses — confidence game — false promise of marriage. Promising to marry a man to get his confidence so as to obtain money from him, with no intention of fulfilling the promise, is held to be within a statute making the confidence game a penal offense in People v. Miller, 278 Ill. 490, 116 N. E. 131, annotated in L.R.A.1917E, 797.

While, under the ordinary statutes concerning false pretenses, the general rule is that a mere promise to do something in the future will not constitute a false pretense, this case, in holding that the obtaining of money from a person by entering into a marriage contract without any intention of keeping the promise constitutes that offense under the statutes of Illinois, is not necessarily in conflict with the other cases, inasmuch as it is based upon the statute of that state known as the Confidence Game Statute.

Several cases which involved other false representations than the promise to marry, sufficient to sustain the indictment for obtaining money by false pretenses, clearly indicate that the promise to marry alone would not be considered sufficient to sustain the charge.

False pretenses — physician's services. Professional services of a physician are held to be within a statute imposing a penalty upon whoever obtains from another by false pretenses any money, personal property, or valuable thing in the Mississippi case of State v. Ball, 75 So. 373, L.R.A.1917E, 1046.

This appears to be a case of first impression upon the question of whether the procuring of services by means of false pretenses will constitute the crime of false pretenses.

False pretenses — use of worthless check. The giving of a worthless check is held in the New Mexico case of State v. Tanner, 164 Pac. 821, L.R.A.1917E, 849, to constitute a representation that the drawer has credit with the drawee bank for the amount involved, and said representation relates to an existing fact, so that a prosecution for obtaining money by false pretenses may be maintained.

Food — classifying custard as ice cream — constitutional law. Classifying articles sold as custard and frozen custard as ice cream in an ordinance requiring ice cream to contain a certain percentage of butter fat, the effect of which will be to exclude such articles from the market, is held to violate the constitutional right to liberty of one seeking to sell them, in the Louisiana case of New Orleans v. Toca, 75 So. 238, L.R.A. 1917E, 761.

Franchises — county franchise — city limits. A utility is held in Re Southern Sierras Power Co. P.U.R. 1917F, 474, to have no right to operate within the limits of a city in California, by virtue of a franchise obtained from the county prior to the incorporation of the city, where it never exercised its rights under such franchise in the territory in which the city is located.

Highway — injury by fence wire — liability of owner. A property owner is required to maintain his premises in a condition of safety to travelers on the public road. Hence it is held in the Louisiana case of Atkins v. Bush, 74 So. 897, annotated in L.R.A.1917E, 809, that if, by his negligence or lack of attention, the end of a strand of barbed wire becomes detached from the fence post in front of his residence and remains lying in the public road, the owner of the property is liable in damages for injuries suffered by a traveler who, without fault or negligence on his part, becomes entangled in the wire and is thereby injured.

Highway — private alley — right to close. One who acquires title to all the property abutting on a private alley established for the use of such property is held entitled to close it in Smith v. Thomas Elevator Co. 278 Ill. 328, 116 N. E. 113, annotated in L.R.A.1917E, 721, although the public may have enjoyed a more or less extensive permissive use of it for more than twenty years.

Husband and wife — effect of divorce a mensa on estate by entirety. That a divorce a mensa et thoro does not destroy an estate held by the parties by entirety so as to prevent the entire estate from passing to the survivor is held in the North Carolina case of Freeman v. Belfer, 92 S. E. 486, L.R.A.1917E, 886.

Husband and wife — void marriage — division of estate. A woman who, after entering in good faith into a marriage void because within the prohibited time after her husband's divorce from another woman, lives with him until his death, is held entitled in the Washington case of Re Brenchley, 164 Pac. 913, L.R.A.1917E, 968, to share after his death in property to the purchase of which she contributed from her individual earnings.

Insurance — on contents of building — provision against. Insurance taken upon the contents not covered by insurance of a barn so covered is held in Hurst Home Ins. Co. v. Deatley, 175 Ky. 728, 194 S. W. 910, annotated in L.R.A. 1917E, 750, not to be within a provision in the policy upon the latter that insured shall take out no additional insurance either on the within-described property or on property within buildings insured by this company.

Lien — statutory — automobile. The legislature, it is held in the South Carolina case of Merchants' & Planters' Bank v. Brigman, 91 S. E. 332, L.R.A. 1917E, 925, may impose a lien upon an automobile for injuries done by it, which shall be superior to that of a chattel mortgage executed after the passage of the statute, but before the injury is done, and which shall be valid against the owner, although the machine was at the time of the injury in possession of a stranger.

This seems to be a case of first impression as to the constitutionality of a statute which gives a lien on an automobile superior to other liens, for injuries done by it.

A statute giving a lien upon an auto for injuries done by it was under consideration in Parker-Harris Co. v. Tate, 135 Tenn. 509, 188 S. W. 54, L.R.A.1916F, 935, but that act does not, like the act in the Brigman Case, provide that the lien thereon to the injured party should be superior to other liens, and so the court refused to give it such effect. While the constitutionality of the statute was not in question, the court did, in the course of its opinion, give utterance to a dictum which is seemingly in conflict with the decision in the Brigman Case.

Marriage — issuance of license — negligence. One who issues a marriage license for a girl under age living in another county, upon the affidavits of strangers who proved to be men of bad character, when he might have communicated with her parents by telegraph, is held to be within the operation of a statute imposing a penalty on one who issues such license without reasonable inquiry in the North Carolina case of Gray v. Lentz, 91 S. E. 1024, annotated in L.R.A. 1917E, 863.

As statutes regulating the issuance of marriage licenses and the performance of marriage ceremonies are considered to be enacted in the interest of public policy, the courts have looked with disfavor upon any violation thereof, intentional or unintentional, and so have construed them strictly against those who have a duty to perform thereunder. This decision is in full accord with the earlier North Carolina cases.

The majority of the decisions on this question are cases where one of the parties was under the age of consent and the license was issued, or the ceremony performed, without the consent of the parent or guardian; and as to the effect of a noncompliance with the terms of the statutes the authorities are in complete harmony.

Master and servant — Federal Employers' Liability Act. The Federal Employers' Liability Act is held in Roebuck v. Atchison, T. & S. F. R. Co. 99 Kan. 544, 162 Pac. 1153, L.R.A.1917E, 741, to provide a remedy only in cases where the employee is killed or injured from a cause incidental to or arising out of railroad employment, and therefore the ordinary rules governing the relation of master and servant necessarily apply, and the carrier is liable only where it has been negligent in the performance of some duty imposed upon it as employer.

This was an action to recover damages for the death of plaintiff's husband, a section foreman, in defendant's employ, who was stabbed by a Mexican employed under him.

There does not appear to be any other case in which recovery was sought under the Fed-

eral Employers' Liability Act for injuries caused by assault by a fellow workman.

Master and servant — Federal Employers' Liability Act — peeling bark from ties. An employee of an interstate railroad engaged in peeling bark from ties intended for future use in the roadbed is held not engaged in interstate commerce in Karras v. Chicago & N. W. R. Co. 165 Wis. 578, 162 N. W. 923, L.R.A. 1917E, 677, so as to come within the Federal Employers' Liability Act, although the work is done on the right of way.

Master and servant — hatchet as simple tool. A hatchet being a simple tool, no duty devolves upon an employer to inspect one furnished an employee for the removal of bark from ties, or to instruct him in its use, and the employer is therefore held not liable for injuries to the employee from an attempt to use a dull and nicked instrument furnished for such work in Karras v. Chicago & N. W. R. Co. 165 Wis. 578, 162 N. W. 923, L.R.A.1917E, 677.

Master and servant — scope of authority — invitation to cross railroad tracks. The invitation of a crossing tender to one whose passage along the highway is blocked by a standing train, to cross the tracks behind the train, outside the limits of the highway, is held not to bind the railroad company in Lynch v. Boston & M. R. Co. 226 Mass. 522, 116 N. E. 248, accompanied by supplemental annotation in L.R.A.1917E, 819, since it is not within the scope of his authority; at least, where it is a statutory offense to walk on a railroad track.

Master and servant — use of automobile. Where, with the acquiescence of the employer, an employee, while engaged with the employer's automobile in the general line of his authority, uses the automobile for his own purposes, and while doing so injures one on the street, the jury, it is held in the Florida case of Anderson v. Southern Cotton Oil Co. 74 So. 975, L.R.A.1917E, 715, should be permitted to determine under appropriate instructions whether the defendant employer is liable.

Master and servant — workmen's compensation — average weekly wage. The time lost because of inclement weather, it is held in Bartoni's Case, 225 Mass. 349, 114 N. E. 663, L.R.A.1917E, 765, should be deducted in ascertaining the average weekly wage as a basis for compensation under a Workmen's Compensation Act which provides that the average weekly wage shall be the earnings during the twelve calendar months immediately preceding the injury divided by fifty-two; but if the injured employee lost more than two weeks during such period then the earnings for the remainder of such twelve calendar months shall be divided by the number of weeks remaining after the time so lost has been deducted.

Mines — failure to drill oil well — remedy. The lessor in an oil and gas lease, it is held in the West Virginia case of Steele v. American Oil Development Co. 92 S. E. 410, annotated in L.R.A. 1917E, 975, may maintain a suit in trespass on the case to recover damages for the injury sustained by him because of the failure of the lessee to drill wells necessary to save the oil on his land and prevent it from being drained by wells drilled on adjacent lands.

Mines — support for school building — taking of property. That requiring coal to remain unmined under a school building for purposes of support, when the right to mine it was reserved in a conveyance of the school property, would unconstitutionally interfere with property rights is held in Com. ex rel. Keator v. Clearview Coal Co. 256 Pa. 328, 100 Atl. 820, L.R.A.1917E, 672.

Mortgage — redemption — time. After the lapse of a year from the date of a mortgage sale, it is held in Wade v. Major, 36 N. D. 331, 162 N. W. 399, annotated in L.R.A.1917E, 633, that the courts have full power to permit a redemption when equity and justice demand it.

The importance of this case is apparent from the fact that, so far as research has disclosed, it is the only one which has allowed redemption from mortgage foreclosure sale

after the expiration of the time allowed by statute for redemption, on purely equitable grounds, apart from fraud or mistake on the part of the purchaser or his privies or the public officers, preventing redemption within the prescribed time, and apart from a contract to extend the time of redemption. It seems opposed on principle to several decisions and to various statements by the courts in cases which, however, did not apparently present a state of facts calling for equitable relief even if in a proper case such relief by way of redemption after the expiration of the statutory period may be granted. The dissenting opinion in Wade v. Major is strong; and yet, in view of the cases, it cannot be said that the majority opinion is opposed to any settled weight of authority.

Municipal corporation — injury in public building — liability. A municipal corporation which constructs under legislative authority an auditorium for the use of its inhabitants, for the use of which it sometimes receives pay, is held liable in the California case of Shafer v. Long Beach, 163 Pac. 670, annotated in L.R.A.1917E, 685, for injury to one attempting to use the building on a public occasion by the giving way of a portion of it through negligent construction or maintenance, although no revenue is to be received for the use of the building on the particular occasion when the accident occurred.

There is a decided conflict of authority upon the question of municipal liability for injuries from defects in building used for the convenience or pleasure of its inhabitants, the decisions in the main depending upon the fact whether the building in question at the time of the occurrence of the accident was being used in a public or private capacity by the municipality.

Negligence — open stairway — injury — liability. The proprietor of a store is held liable in damages in Reese v. Abeles, 100 Kan. 518, 164 Pac. 1080, L.R.A.1917E, 747, to a customer who falls into an open stairway in the floor, which is partially obscured in semidarkness, caused by piles of merchandise stacked thereabout, when the customer went into the vicinity of the stairway to inspect certain shelf goods near by in response to a special invitation of the proprietor, who at the same time failed to give her a warning of the presence of the stairway.

Partnership — impaired capital — division. Where the capital of a partnership to which one person contributed capital and the other his services for an equal division of profits has become impaired, it is held in the North Carolina case of Moseley v. Taylor, 91 S. E. 1035, annotated in L.R.A.1917E, 875, that that remaining must be returned to the one contributing it upon the winding up of the concern.

Principal and agent — excess of authority — effect. Defendant is a manufacturer of creamery butter at Omaha. F. M. Woods was its agent in charge of its cream station at Niobrara. The agent purchased a quantity of cream, paying therefor $2.01 a pound, when the market value was only 30 cents. For the cream so purchased he issued defendant's checks to the venders on blanks furnished by it, which, when presented, defendant refused to pay, on the ground that the agent had exceeded his authority in the premises. It is held in W. W. Marshall & Co. v. Kirschbraun & Sons, 100 Neb. 876, 161 N. W. 577, that the agent's acts in the premises were in excess of the real and the apparent scope of his authority, and defendant is not liable for any sum in excess of the market price of 30 cents a pound.

The cases on implied or apparent authority of an agent to fix a price are appended to the decision in L.R.A.1917E, 788.

Rate — power of Commission — increase of maximum rate fixed by statute. The Missouri Public Service Commission is held in the Missouri case of State ex rel. Rhodes v. Public Service Commission of Missouri, P.U.R.1917E, 315, 194 S. W. 287, to have power to raise railroad rates above the maximum fixed by statute prior to the enactment of the Public Service Commission Act, by virtue of § 47 of the latter act, conferring upon it power to determine, after hearing, just and reasonable rates.

Rates — telephones — business or residence subscriber. That a telephone subscriber who is engaged in the retail lumber business, and is so listed in the

telephone directory, and so advertises on his stationery, should pay on the basis of a business subscriber, although, for his convenience, the telephone is located at his residence, in close proximity to the place of business, is held in the Montana case of Roby v. Fife-Wayne Farmers Teleph. Co. P.U.R.1917F, 202.

Record — of arrest — right to cancelation. That an innocent person arrested through mistake has no right to have the record of the arrest made by the police under statutory authority canceled or destroyed is held in the Michigan case of Miller v. Gillespie, 163 N. W. 22, L.R.A.1917E, 774.

This case seems to be the first to have directly passed upon the question of the right of one who has been arrested to have the record of such arrest as made and retained for possible future reference by the police surrendered for cancelation. However, the denial of a right to have such record destroyed is in keeping with the weight of authority upon the closely allied question of the right to take or retain in a rogues' gallery the picture of one accused of crime before conviction.

Seduction — action by parent. No action, it is held in the Louisiana case of Kaufman v. Clark, 75 So. 65, will lie for damages resulting from injury to the feelings of one person by reason of injuries alleged to have been inflicted upon the person, character, or feelings of another still living; hence, a parent cannot maintain an action for injury to her feelings resulting from the betrayal of a daughter still living.

The cases as to action for seduction independently of loss of services are collected in the note accompanying the foregoing decision in L.R.A.1917E, 756.

Service — express — perishable goods — attempt to deliver — notice to consignee. An express company, upon finding the consignee's place of business closed when attempting to deliver a shipment of perishable goods, is held in the Indiana case of Worm & Co. v. American Exp. Co. P.U.R.1917E, 846, under no obligation to telephone to the consignee's home, advising him of the receipt of the goods, in order to escape liability for damages for delay in delivery.

Service — jurisdiction of Commission — Dispute over amount of water consumed. The New Jersey Commission is held in Hirsh v. Plainfield-Union Water Co. P.U.R.1917F, 38, to have no jurisdiction over a dispute between a consumer and a utility as to the amount of water used, since such questions must be settled in a court of law.

Service — street railways — newspapers, baggage, express, and freight. Street railways, it is held in the Massachusetts case of Re Worcester & W. Street R. Co. P.U.R.1917F, 589, should be allowed to act as common carriers of newspapers, baggage, express, and freight where they have proper facilities therefor, and the additional service can be performed without congestion of traffic or menace to public safety, or without inconvenience to regular passenger business.

Street railway — motorman blinded by automobile light — duty. A motorman operating an electric street car is held negligent in the Maine case of Foster v. Cumberland County Power & Light Co. 100 Atl. 833, annotated in L.R.A. 1917E, 1044, in failing to reduce his speed to the lowest possible rate or stop when he is blinded by the light of an approaching automobile so that he can see nothing ahead of him.

Travelers on highways are required to exercise reasonable care toward others likely to be encountered. One of the most important duties imposed upon them is that of keeping a lookout for other travelers, and when one is so blinded by a light that he cannot see and discharge this duty, he should stop, or at least reduce his speed to the minimum. The few cases which have considered the question are in accord with this view.

Street railway — running car towards drove of cattle. That a motorman of an interurban street railway using tracks in a public highway may be found to be negligent in running the car 45 miles an hour towards cattle approaching on the highway which can be seen for a distance of half a mile and some of which are al-

most constantly on the track, so as to render the company liable in case the car hits some when it reaches the drove, is held in the Michigan case of Beweinitz v. Detroit, J. & C. R. Co. 161 N. W. 976, annotated in L.R.A.1917E, 774.

Tax — to secure location of university. By § 6, article 9, of the state Constitution, the corporate authorities of cities may be authorized by statute to assess and collect taxes for all "corporate purposes." The levy of a tax by the city of Lincoln for campus extension to induce the location of the state university favorably to the interests of the city is held to be for "corporate purposes," in the Nebraska case of Sinclair v. Lincoln, 162 N. W. 488, and it follows that the provision of Rev. Stat. 1913, § 4546, authorizing such levy, does not violate that section of the Constitution.

The right of a county or municipality to use public funds to secure the retention or location of a state institution within its limits is discussed in the note accompanying the foregoing decision in L.R.A.1917E, 842.

Most of the cases support the power of the legislature to authorize counties or municipalities to use their funds to secure the location of a state institution.

Workmen's compensation — assault by stranger. The petitioner for compensation under The New Jersey Workmen's Compensation Act (Pamph. Laws 1911, p. 134) was using a barrel as one of the implements of his service. Two strangers carried it away a short distance, and petitioner was directed by his immediate superior, one of the servants of his employer, to recover it; and when petitioner approached the strangers they threw the barrel down and assaulted him, and he was severely injured. It is held, in the New Jersey case of Nevich v. Delaware, L. & W. R. Co. 100 Atl. 234, L.R.A. 1917E, 847, that the accident arose out of and in the course of his employment.

Workmen's compensation — injury out of state. That a workmen's compensation act does not apply to injuries arising out of the state, unless the intent that it shall have that effect is held manifest by express words or clear implication, in the California case of North Alaska Salmon Co. v. Pillsbury, 156 Pac. 93, L.R.A.1917E, 642.

Workmen's compensation — vessel in foreign port. That the Workmen's Compensation Laws of a state do not extend to an injury on a domestic vessel while it is in a foreign port is held in the California case of Kruse v. Pillsbury, 162 Pac. 801, L.R.A.1917E, 645.

Recent Canadian Decisions

[Note.—The more important of these decisions will be reported, with full annotations, in British Ruling Cases.]

Contracts — validity — intoxication of party — ratification. A contract entered into by a man while too drunk to know what he was about when entering into it is voidable, and not void, and is therefore capable of ratification by him when he becomes sober; and the failure to repudiate such contract within a reasonable time after he became sober and had full knowledge of his contract is tantamount to an express ratification. Bawlf Grain Co. v. Ross, 55 Can. S. C. 232, 37 D. L. R. —.

Master and servant — action by employee for breach of contract — mitigation of damages — deduction of profits of business venture. A sales manager was employed by a corporation for a term of five years, but three years thereafter the company, having become insolvent, went into liquidation, and he was unemployed for the balance of the term. By purchasing the assets of the insolvent company he made a profit in excess of what he would have earned as salary had the contract been fulfilled. In an action by him against the estate of a director who had guaranteed the payment of his salary, it was held that as such profit could not have been made by him

if the contract had been fulfilled it should be taken into account in assessing damages. Cockburn v. Trusts & Guarantee Co. 55 Can. S. C. 264, 37 D. L. R. —, affirming 38 Ont. L. Rep. 396, heretofore noted in this column.

Municipal corporations — erection of public convenience along and under highway — injurious affection of abutting property — liability to make compensation. That the owners of a department store are entitled to compensation in respect of the erection and maintenance by the municipality of a public lavatory upon and under a city street adjoining the store, although no land of the claimants was taken and the highway was not obstructed, the effect of the location and the lavatory in that vicinity being to render the claimants' property less desirable for department store purposes, is held by the Supreme Court of Canada in Toronto v. J. F. Brown Co. 55 Can. S. C. 153, 37 D. L. R. —, affirming a decision of the Ontario Appellate Division heretofore noted in this column.

Towage — divisibility of contract — sufficiency of performance — maritime lien. The Exchequer Court of Canada has recently held, in Neville Canneries v. The Santa Maria, 36 D. L. R. 619, that although a towage contract providing for payment per diem is a divisible contract as to each day's services performed, there can be no recovery under the contract in the event of a prolongation of the voyage through the plaintiff's unjustifiable delay. The same case holds that a claim for towage is not the subject of a maritime lien.

Growth and Volume of Litigation

Members of the bar frequently speak in reverence and admiration of the great judges of the past, with the statement that the traditions and judicial achievements of the bench are not being measured up to by the present generation. The judges in that day and time had a better opportunity to create imperishable names. The maximum number of opinions that a judge would be required to write, in the days of Marshall, Story, Taney, Sharkey, and Kent, did not exceed twenty per annum, the average not reaching that number. American government, both national and state, was then in a gradual process of development and judicial growth. The volume of litigation then pressing upon the judges was not great because there was not such a condition existing in the country as to bring about a great multiplicity and volume of litigation.

The judges of such a time had a greater opportunity for research, investigation, and consideration before reducing their conclusions to writing. Now, the judge is supposed to be a judicial race horse, and to keep up with the docket, regardless of the number of appeals brought for his consideration.— Governor Robert L. Williams.

A Record of Bench and Bar

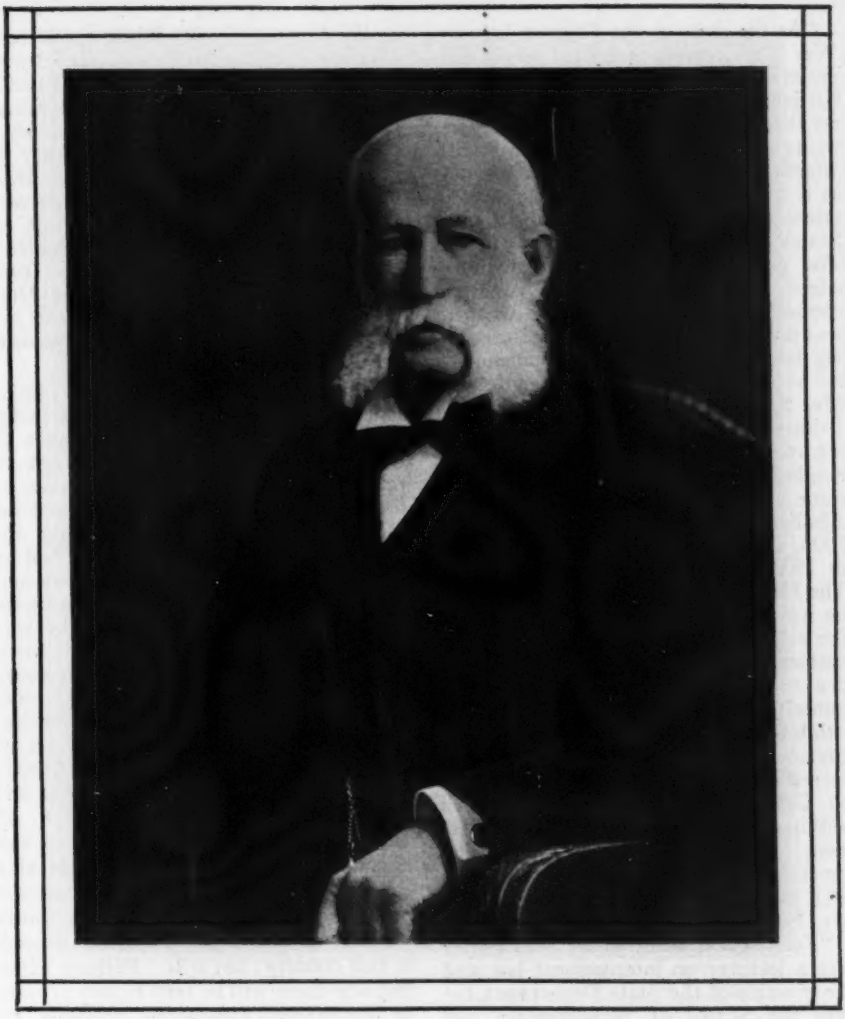
Hon. John W. Foster

Veteran Diplomat and Authority on International Law.

WITH a record of practically a half century of continuous service in diplomacy and the practice of international law, John Watson Foster had a fair claim to the title of dean of the diplomatic service of the United States. He was born, states The New York Evening Post, "in Pike County, Indiana, March 2, 1836, was graduated from Indiana University in 1855, studied at the Harvard Law School for a time, and was admitted to the Indiana bar in 1857, practising in Evansville until 1861, when he entered the Union Army as major of the Twenty-fifth Indiana Volunteers. After seeing some hard fighting at Fort Donelson, Shiloh, and elsewhere, he was promoted colonel, and headed a brigade of cavalry when General Burnside's division entered Knoxville in 1863, and at the end of the war was brevetted brigadier-general. In 1865 he became editor of the Evansville Daily Journal, resigning in 1869 to become postmaster at Evansville. He remained there until 1873, when he began his diplomatic career as Minister to Mexico in Grant's Administration, and for half a century remained in the diplomatic service of the United States.

"Mr. Foster served in Mexico for seven years, having been reappointed by President Hayes in 1877, and in 1880 was transferred to Russia by Hayes. During his stay in Mexico he devoted himself to an exhaustive study of international law, and continued with even greater assiduity during the two years he was in Russia. It was during his Mexican career that General Diaz was elected President, and in his memoirs Mr. Foster describes the scenes leading up to the revolution which put Diaz into power. Late in 1881 Mr. Foster resigned as Minister to Russia and returned home, owing to the pressure of private business, but in 1883 he was appointed Minister to Spain by President Arthur. He remained there two years, and then returned to Washington to take up his practice of law, acting in international cases as counsel for foreign legations before arbitration boards and commissions.

"By this time Mr. Foster's reputation as one of the greatest authorities on international law was firmly established, and foreign governments sought his services in important cases, while his own government, on many occasions, secured his services for delicate diplomatic missions. In 1890 he was a special agent of the State Department to assist the President and Secretary Blaine in the negotiation of reciprocity treaties, and was especially successful, treaties with France, Germany, Austria, and Spain,



HON. JOHN W. FOSTER

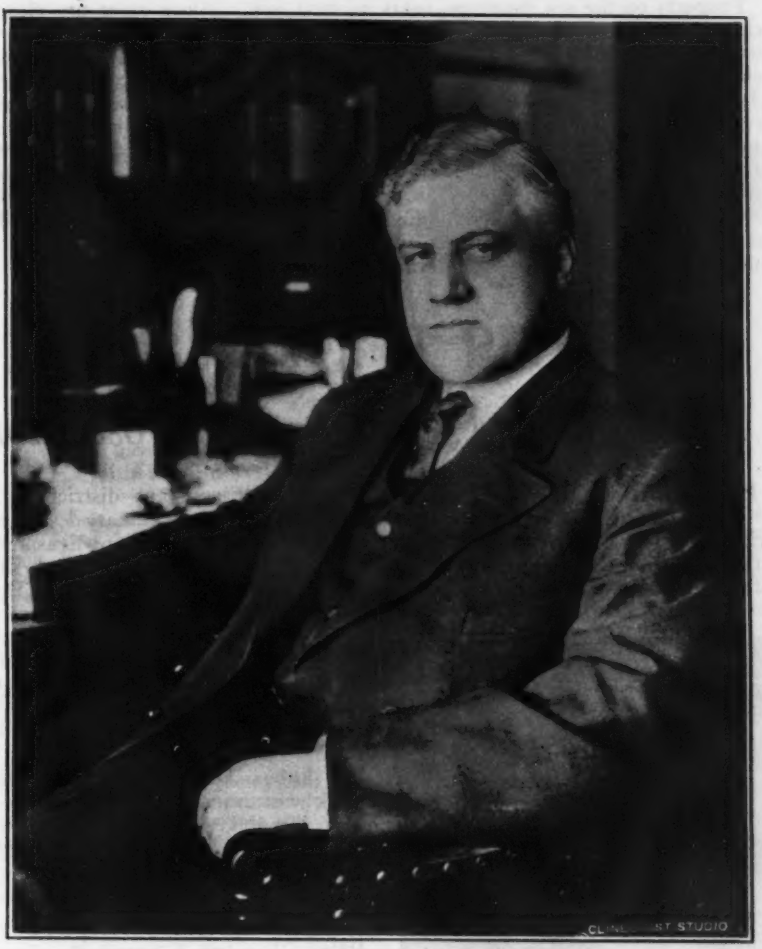
and all the South American countries except Venezuela and Colombia being concluded with his aid. He also rendered efficient aid to President Harrison in the Chilian affair, the Canada-United States trade relations negotiations, and in the conduct of the Bering sea controversy; being named as the agent to prepare and conduct the case of the United States before the Bering sea arbitration tribunal. In 1892 he was appointed Secretary of State to succeed Blaine, although it was feared that his joining the Cabinet would leave the Bering sea matter in the air; but it was decided that, as the time was short for the presentation of the case to the arbitrators, he could perform both duties.

"At the close of the Chinese-Japanese War Mr. Foster was invited by the Emperor of China to take part in the negotiations for peace with Japan. His work on that occasion was given in the memoirs of Li Hung-Chang who wrote affectionately of Mr. Foster, not only as a personal friend, but as a representative of the friendship of the United States for China in her hour of trial. The great Chinese statesman acknowledged frankly how valuable was the counsel of his American friend when he was confronted with the task of preserving his country against the demands of its victor. Soon after the conference Mr. Foster went to Russia and Great Britain on a special mission, and on his return, in 1898, was a member of the Anglo-Canadian Commission. He became agent of the United States in the Alaskan boundary tribunal in London, in 1903, and his last public appearance was in 1907, when he represented China in The Hague Peace Conference, for which he was said to have received the largest fee ever paid to a practitioner in international law. After that he lived in practical retirement in Washington, devoting himself to literary work. On his eightieth birthday anniversary, March 2, 1916, President Yuan Shi-Kai of China conferred upon him the Order of the Golden Grain, the highest order of merit within the gift of the Chinese government. Yuan had been the commanding general of the Chinese troops in the clash with Japan which brought on the conflict Mr. Foster took a part in adjusting.

"For a great many years Mr. Foster was a lecturer on international law and the practice of the State Department before the School of Jurisprudence and Diplomacy of the Columbian University in Washington, D. C. His lectures were extremely popular and invariably attracted many hearers. He also contributed a number of highly interesting and valuable works to the history of diplomacy."

He was the author of "A Century of American Diplomacy," "American Diplomacy in the Orient," "Arbitration and The Hague Court," "The Practice of Diplomacy" and "Diplomatic Memoirs." He received the LL.D. degree from Princeton, Wabash, Yale and the University of Pennsylvania. His death occurred in Washington, D. C., on November 15.

"Sometimes in our hit or miss diplomacy," comments the Philadelphia Ledger, "a man of ability has a chance to remain in the service long enough to make a mark. That was the fortune of the late John W. Foster. He had no especial training at the time of his appointment as Minister to Mexico, and he might not have risen above the rank and file of his colleagues had the exigencies of politics displaced him before he was sent to St. Petersburg. He took his work seriously, he devoted himself to the study of international law, and he was able, after retiring for a time from the service, to play a prominent and useful part in various special missions for the American government, as well as to act as adviser to the Chinese government, of which he was the representative at the Second Hague Congress. He was also Secretary of State under Harrison—the post which his son-in-law now fills. Such a career as this ought not to be unusual in this country; but it is. Perhaps after this war there will be fewer cases of men of diplomatic experience removed to make way for novices."



Hon. A. Mitchell Palmer

Custodian of Alien Property.

A. MITCHELL PALMER, former representative from Pennsylvania, and a member of the Pennsylvania bar, has been appointed custodian of alien property under the Trading With The Enemy Law. He will act as trustee for all enemy property in the United States or issue license exempting concerns under his supervision. He will hold all alien properties until the end of the war and then deal with them as Congress may direct.

It is a usually recognized principle of international law that while property on land, belonging to an enemy alien, may be requisitioned, it may not be confiscat-

ed. Property on the sea, however, boats or cargoes, under an enemy flag, may be seized with perfect legality. In the case of enemy material property on land that might be used for military purposes, the rule of requisition holds, and, in the case of credits, the process of sequestration is recognized.

As to the requisition of enemy property in the jurisdiction of the United States, there are wide differences of opinion among the experts on international law. Many cases are clear; but partnership, marriage of an enemy alien to an American citizen, and the question of domicil quickly involve the matter.

Whatever Mr. Palmer may requisition or sequester, as custodian, it is probable that a commission will be necessary, after the war, to settle numerous disputes.

Some recent announcements made by Mr. Palmer may be found in the Editorial Comment department of this number.

New York's First Woman Prosecutor

MISS HELEN P. McCORMICK has been appointed a deputy assistant district attorney by District Attorney Harry E. Lewis of Kings County. She is the pioneer woman prosecutor of Greater New York.

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MISS HELEN P. McCORMICK

The new assistant district attorney, who took office on January 1, is a native of Brooklyn, a graduate of Erasmus Hall high school and St. Lawrence University, and at present is a Labor Department inspector charged with prosecuting infringements of the law. She is chairman of the legal department of the Tenth Assembly District Suffrage Club, chairman of the Women Lawyers' Association, and a member of the Gamut Club. Previous to being connected with the Labor Department, Miss McCormick was an instructor of defective children in public school No. 140, at Fourth avenue and Fortieth street. In 1908 she graduated from St. Lawrence Law University, in 1912 from the Brooklyn Law School, and in 1913 was admitted to the Bar.

An impromptu reception was tendered to the new assistant district attorney in the district attorney's office, at Court and Livingston streets, after she had been appointed.

Miss McCormick fills the vacancy caused by the resignation of Assistant District Attorney Hersey Egginton, who retires the first of the year to resume the practice of law. Her duties will deal mainly with cases in which women are involved. It is the duty of the person in charge of this branch to sift the evidence to see whether a crime has been committed.

New Books and Periodicals

That place that does contain
My books, the best companions, is to me
A glorious court, where hourly I converse
With the old sages and philosophers.—Beaumont and Fletcher.

"Trial of Sir Roger Casement." Edited by George H. Knott, M. A. (Edin.) of the Middle Temple, Barrister-at-Law. (Cromarty Law Book Company, Philadelphia.) $2.75.

This report of the trial of Sir Roger Casement for high treason, and of the appeal to the Court of Criminal Appeal, is based, as the editor tells us, on the transcript of the notes taken by the government shorthand writers each day of the proceedings. It is a verbatim report, except for such parts of it as are of a more or less formal character, where the direct narrative form is followed instead of that of question and answer.

Numerous documents and photographs will be found throughout the work, and in the Appendices, relating to the persons who were engaged in the proceedings, or to things which were produced as evidence at the trial.

This accurate record of a famous historic trial will prove of interest to American lawyers.

"The Law of Trademarks and Designs in Canada." By Russell S. Smart. (Cromarty Law Book Co., 1112 Chestnut St., Philadelphia.) $4.50.

This well-arranged volume presents clearly the Canadian statutes and case law pertaining to trademarks and designs. It discusses extensively such questions as the nature and definition of a trademark, and the classification, registration, acquisition, and abandonment, transfer or assignment, of this species of property. There are chapters on actions for infringement and criminal prosecutions.

The Canadian legislation together with rules and forms are added as an appendix to the work.

"Inter-America." A monthly magazine. (Doubleday, Page, & Co., New York City.) Edited at 407 West 117th St., New York.

This publication is twofold. It consists of an English Inter-America, six numbers per year, and a Spanish Inter-America, six numbers per year. These are issued alternately, the Spanish numbers being made up of diversified articles translated from the periodical literature of the United States, and the English numbers are composed of similar articles translated from the periodical literature of Spanish or Portuguese speech.

The magazine does not publish original articles or make editorial comment. It merely translates what has been previously published, without approving or censuring, in order that the reading public of all the American countries may have access to ideas current in each of them.

Inter-America was founded at the instance of the Carnegie Endowment for International Peace, one object of which is to cultivate friendly feelings between the inhabitants of the different countries through the diffusion of a clearer knowledge of each other.

The subscription price for either the American or Spanish edition is 80 cents per year, or $1.50 for both.

"Public Affairs Information Service." (Managed by the H. W. Wilson Co., 958 University Ave., New York City.)

This is a co-operative organization for collecting, classifying, and disseminating information upon all questions relating to government, finance, social welfare, current legislation, and other matters of public concern.

A bulletin is published weekly and is followed by a bimonthly and annual cumulated bulletin.

A scale of prices has been adopted to meet the need of various classes of institutions.

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Holmes, Federal Income Tax, $4.00.

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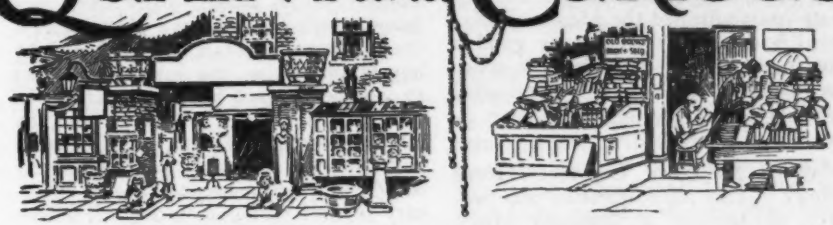


A sheaf of gleanings culled from wayside nooks.

What Is an Angel? The report comes of a strange decision by the judge of a court in Detroit. It is that the statue at the gate of a local cemetery be taken down and changed according to the ideals of truth. The statue was the stone figure of an angel. The judge objected to it on two accounts: First, it was too fat, and the court ordered the artist to chip the surplus fat off. The second objection was that the artist had committed the blunder of making the angel a man, instead of a woman. So the artist was instructed to work away on his figure and turn the man into a woman. The judge had not consulted his Bible; if he had done so he would have found that wherever there has been reference to angels where the sex has been indicated they have been men. This is true of angels of darkness, as well as those of light. If the judge appeals to the judgment of sculptors and painters, who have been for centuries giving face and form to the Scriptural definition of angels, he will find at least that the male angel has not been taboo. There are artists, to be sure, who have found it more consonant with their notions of the angelic to picture angels as feminine, but no one has ever denied that there were masculine angels; and it is the best judgment of artists that the angel should be always masculine. It is said that the authorities of the Episcopal Cathedral of St. John the Divine in New York rejected the angels of the artist because they were feminine, and that the artist was so angry that, instead of trying to change them, he broke the statues in pieces with his hammer. Women are more like our notion of angels than men, but they are not angels. Men have angelic qualities, but they are not angels. It is better to be men and women than angels, in the earthly estate. Angels as merchants, doctors, lawyers, mechanics, or even preachers, would have a hard time making a living. People sometimes say, "Well, our minister is human." Certainly he is, and that is why they like him so well. They would not give an angel $100 a year to become their pastor. —The Christian Herald.

Judge-made Law. When lawyers are defeated in the supreme court by that tribunal taking cognizance of the maxim that "it is the letter of the law that killeth, but the spirit that maketh alive," they sometimes elevate the tips of their proboscides and sneer at the decision against them as "judge-made law." It is not clear that judge-made law may not sometimes promote substantial justice more than statutes enacted by legislatures. There was a case decided by a justice of the supreme court of California at an early day in which the rights of a drunken man were clearly and sensibly defined. The plaintiff, while inebriated, had stepped upon a rotten plank in the sidewalk, which gave way under him, and as a result his leg was broken. He sued the city, and the answer of the municipality was that, as the plaintiff was intoxicated at the time of the accident, he was guilty of contributory negligence and therefore not entitled to recover. This plea proved unavailing with the court and jury, and

he was accorded a judgment for damages. The city appealed, but the supreme court affirmed the judgment, saying: "A drunken man has as good a right to a perfect sidewalk as a sober man, and he needs one a good deal more."

May a Receiver Conduct Horse Racing? This novel question was presented in Gordon v. Business Men's Racing Asso. 140 La. 674, 73 So. 768, where it was contended that the business of the defendant corporation could not be conducted by a receiver, for the reason that the conducting of such a business (horse racing) would be beneath the dignity of the court acting through one of its officers.

"The answer to this," observed the court, "is that, if the business of the defendant cannot be conducted legally, the functions of the receiver will have to be confined to winding up the affairs of the defendant, and that, if it can be conducted legally, the conducting of it cannot be beneath the dignity of the court."

This Happened in Jersey. The lawyer eyed the woman in the witness box in patient despair. "You say, madam," he began, "that the defendant is a sort of relative of yours. Will you please explain what you mean by that?" "Well, it is like this," replied the witness, beaming upon the court, "his first wife's cousin and my second cousin's first wife's aunt married brothers named Jones, and they were cousins to my mother's aunt. Then again, his grandfather on his mother's side and my grandfather on my mother's side were second cousins, and his stepmother married my husband's stepfather after his father and my mother died, and his brother Joe and my husband's brother Harry married twin sisters. I ain't ever figgered out just how close related we are, but I've always looked on him as a sort of cousin." We guess she was quite right.—Bridgeport (Conn.) Post.

Understood. In the early days of Lemhi county, Idaho, many Chinamen found employment in the placer mines. One of these Orientals being called as an important witness, the question arose as to whether or not he could qualify, in view of his peculiar religious faith, by taking the required oath. The defendant's attorney insisted that the witness could not qualify, because it was necessary for one taking such oath to believe in the existence of a God who would punish him if he swore falsely. After considerable argument by the attorneys, which the Chinaman appeared to ignore, but which he completely grasped, the court questioned the witness as follows:

Court: Sam, do you understand that you must tell the truth in this case, the whole truth, and nothing but the truth?

Sam: Yesse, me heap savvy, me must telle the truth.

Court: Do you know what will happen to you if you don't tell the truth?

Sam: Yesse, me know that;—me go to helle alle samme Amelican man.

It is needless to say that the witness was permitted to testify.

All the Same. Among the idiomatic terms adopted by United States marines everywhere, the expression "shove off" is more frequently used than any other. In the sea-soldier lingo, if a marine goes home on furlough, leaves his camp or garrison, or goes anywhere, he "shoves off."

A story comes from France of a marine who had been acting as orderly for a lieutenant. The officer sent him on an errand and when he returned the lieutenant was nowhere about. A poilu, who happened to be loitering in the vicinity, was questioned by the marine:

"Have you seen the lieutenant?"

"Oui, monsieur, oui," replied the poilu, proud of his newly acquired marine corps English, "he have—what you call —pushed over."

*The Defense of Rastus Brown**

Yo' Hono' and Genmen of dis Jury: Dar's pore Rastus Brown in de toils of de law. And what fo'? Fo' de stealin' of a chicken—fo' de takin' of a chicken. Now listen to de formal charge:

United States of America,
State of Indiana,
County of Nowhere,
Town of Oblivion.
In de Piece of a Justice Court.

Joe Johnson, de town marshal, and Jim Jackson, de night watch, both being duly sworn, on deir oaths say dat in said county, on de moonlight night of de 24th day of December, one thousand nine hundred sixteen, *Annie Domino,* one Rastus Brown, early and late of said county, did den and dere feloniously and unlawfully steal, take, purloin, pilfer, and carry away of de personal belongings of Mister Wyandotte White one chicken, commonly called a rooster, but uncommonly called Chief Cockscomb, of de fictitious value of five hundred dollars, but of de real value of 10 cents a pound, weighin' 3 pounds, bein' 30 cents,—against de peace and dignity of de aforesaid Johnson and Jackson and contrary to de Justinian and Blacks'-tonian codes.

Now, Gemmen of dis Jury, Ma Friends, Negroes, Countrymen, lend me yo' ears; and if yo' have any tears to shed prepare to shed dem now. I come not to bury pore Rastus but to save him. Yo' may think because de testimony shows dat Rastus was caught red-handed —I mean black-handed—in de act; dat he was seen to emerge from Mister White's chicken coop with de aforesaid chicken under his arm; dat he was trailed by de footprints on de sands of time he made from dat chicken coop door to de back door of his kitchen; and dat he was caught dere with de aforesaid chicken in his possession; dat dere am no possible defense for pore Rastus under de law. But I say to you, Gemmen of de Jury, dere is a defense fo' him. I appeal to you upon de higher, de supremer, de unwritten law of *dementia Africana.* And if de learned Piece of a Justice should say dat such a law cannot be invoked, I would jus' call yo' attention to de illustrious example of Abraham Lincoln. When Abraham Lincoln was about to issue de famous Emancipation Proclamation freein' all de Negroes in de land from ordinary slavery, dey charged him with breakin' de Constitution he had sworn to sustain. But he answered dat he would sustain de Constitution if he had to break it to sustain it. So, Gemmen of dis Jury, when yo' are about to issue your emancipation proclamation freein' pore Rastus from dis criminal servitude, and dis court or anyone else says yo' are doin' violence to de law yo' took oath to sustain, tell dem in de language of Lincoln dat yo' are goin' to sustain de majesty of de law if yo' have to break it to sustain it. Why, dere's no law in de universe but what's broken sometime or udder. Even de law of gravitation and de laws of de planetary system were broken; fo' don't yo' know de Good Book says dat Joshua commanded de sun and de moon to stand still and dey did stand still.

Now I'se goin' to prove to yo', Gemmen of de Jury, dat de nigge' has de right to take de chicken. De chicken and de Negro belong togedder. Dey sustain de most pleasant relations togedder in dis world, and if dere's no chickens in de nigge' heaven den I say to you dere's no heaven fo' de nigge's. Ever since de days of de flood when de ark rested on A-rat and Noah and his sons started de red, white, and blue races, and his son Ham started de black race—ever since de days of Ham de egg has gone with it. And jus' as shuah as de Negro is de descendant of Ham, and de chicken is de descendant of de egg, and jus' as shuah as ham and eggs go togedder 'mong de white folks so do de nigge' and de chicken go togedder. Why, Gemmen of de Jury,

"Breathes dere de (Negro), with soul so dead
Who never to himself hath said,
This is my own, my native (chicken)?"

*Written as part of a mock trial for a negro minstrel, by Francis J. Vurpillat, ex-Judge of the 44th Judicial Circuit of Indiana and a member of the Law Faculty of the University of Notre Dame, Indiana.

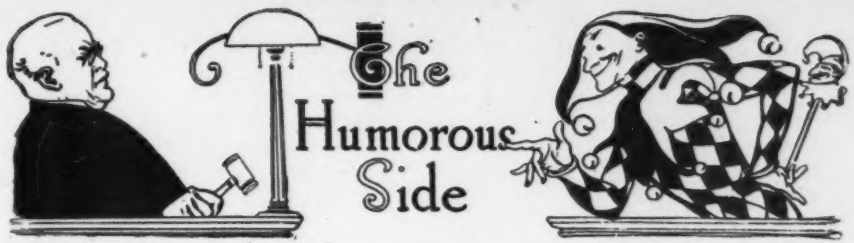
Freedom to de Negro without de right to take de chicken would be no freedom at all; for de most natural propensity, de strongest proclivity, de intensest desire, of de Negro is to take de chicken. Abraham Lincoln knew dis when he freed de nigge's, and you know dat freedom was unlimited. So de nigge' has de civil right as well as de natural right to take de chicken.

Now dese am de general principles upon which dis intelligent jury will surely free dis Negro. But dere are some particular reasons why dey will free him. Why, dis love of de chicken was not only born in pore Rastus but it was bred in him. He was taught to take de chicken at his mudder's knee. One time when little Rastus was only seven years old, de colo'ed minister came to visit de family and he gave Rastus a quarter and told him to buy himself a chicken. But jus' as soon as de minister was gone Rastus' mudder said to him: "Rastus! Yo' dun give dat 25-cent piece to yo mudder and yo' go get dat chicken in de natural way." And I suppose Rastus obeyed de teachin's of his good mudder.

And now we have come to de moonlight night of de 24th day of December when dis awful crime was committed. Pore Rastus had prayed dat de Lord might send him a chicken fo' de Christmas dinner; and yo' may believe me or not, but I will stake my professional reputation and personal reputation on de truthfulness of de story dat, after pore Rastus prayed in vain fo' three days and three nights dat de Lord might send him a chicken, he was about to despair when a ray of light struck him and he heard a small voice say to him: "Rastus, don't yo' know dat de Lord helps dem dat help demselves? Instead of sayin' 'Lord send me a chicken, say 'Lord, send me to a chicken.'" Rastus did, and soon he was on his way dat fateful moonlight night of de 24th day of December, happy to think dat he would have a chicken dinner and a Merry Christmas fo' his family. But alas! how different dat pleasant dream from dis awful reality. Dar's pore Rastus in de toils of de law, chained to de ball, broken-hearted and downcast. And dere by his side sits his pore widowed wife, cryin' as if her heart would break. And look at de three little, innocent pickaninnies, watchfully waiting fo' deir fadder to be free. O how long must dis injustice last; how long is de law's delays?

Gemmen of de Jury, have yo' no hearts? Have yo' no high intelligence and reason to see dat Rastus had no criminal intention in dis case, but dat he was simply moved by dat same dementia dat is de second nature of all us Negroes? Den have de courage of yo' convictions and apply de high, supreme, unwritten law of *dementia Africana* and free pore Rastus here and now. Every man on dis jury who says dat Rastus Brown is not guilty rise in his might and say aye.

(A unanimous uprising and chorus of ayes by the jury. The court directs the signing of the verdict and tells Rastus he is a free man. Whereupon, Rastus expresses his gratitude thus: "Well, Gemmen, I's shuah glad fo' yo' kindness, and I want yo' all to come to my house some moonlight night, after prayer meeting, fo' a chicken dinner.")



I am persuaded that every time a man smiles—but much more so when he laughs—it adds something to this fragment of life.—Sterne.

Somewhat Passive. A lawsuit was recently in full swing and during its progress a witness was cross-examined as to the habits and character of the defendant.

"Has Mr. March a reputation for being abnormally lazy?" asked counsel briskly.

"Well, sir, it's this way —."

"Will you kindly answer the question asked?" struck in the irascible lawyer.

"Well, sir, I was going to say it's this way. I don't want to do the gentleman in question any injustice, and I won't go so far as to say, sir, that he's lazy, exactly; but if it required any voluntary work on his part to digest his food—why, he'd die from lack of nourishment, sir."—Everybody's.

The Doctor's Fault. During the course of a trial in a Cincinnati court the presiding judge thus addressed the man in the dock:

"I am led to understand that you stole the watch of the physician who had just written you a prescription at the free dispensary. What have you to say to this charge?"

"Well, your Honor, I found myself in a desperate situation. His prescription read, 'a spoonful every hour,' and I had no timepiece."

Rural Bribery. The Magistrate: I fine you $25 for exceeding the speed limit.

The Culprit: See here, Squire, this young woman and I want to get married. Remit this fine and you get the job.

Judicial Correction. Unfortunately we've mislaid the judge's name, but his court room is in New Bedford, Massachusetts. Before him appeared a defendant who, hoping for leniency, pleaded, "Judge, I'm down and out."

Whereupon said the wise judge:

"You're down, but you're not out. Six months." — Philadelphia Evening Ledger.

With Proper Legal Trimmings. The tall, sleek, well-groomed negro was a stranger to the town. He had come across from New Orleans and had tried to knife a waiter in a Decatur street restaurant, when arrested. He was still inclined to be cocky when brought before the judge, although his Christmas Day had been spent behind the bars.

"Do you want a lawyer?" demanded the judge. "This is a very serious charge."

"No sah, no sah," was the prompt reply. "Ef I got ter go up, jedge, lemme do hit quiet like. I don't want no attorney helpin' me git dar quicker dan I would nachally."

Talk and Talkers. "After all," said Attorney General Gregory at a dinner in Washington, "was there ever a great talker who wasn't a great bore? Look at Coleridge.

"I said to a man the other day:

"'The judge is a splendid talker, isn't he?'

"'The finest,' said the man, 'I ever escaped from.'"

Was Only Humming. A gigantic private was brought before his commanding officer one morning charged with being disorderly in the public street.

"Who makes the charge?" asked the colonel.

"I do, sir," replied a sergeant. "I was in the town last night, when I heard someone bellowing and roaring songs about 300 yards away. I went to the spot and saw the prisoner, Private Jones, singing at the top of his voice."

"And you could hear him 300 yards away?" asked the colonel.

"Yes, sir."

"Well, what have you to say, Private Jones?" continued the colonel, turning to the prisoner.

"Please, sir," said Private Jones, "I was only humming!"—Chicago Blade.

Rapid Promotion. The late Admiral Mahan, at the beginning of the War, was arguing with a lady at a luncheon about the British Navy.

"But, my dear madam," said the admiral, "it is hard to argue with you, because you are so—er, pardon me—so ignorant.

"You remind me of the young wife who said to her brother about her volunteer husband:

"'Isn't Jack just wonderful? Think—he's already been promoted to field marshal.'

"'From private to field marshal in two months? Impossible,' said the brother.

"'Did I say field marshal?' murmured the young wife. 'Well, perhaps it's court-martial. I know it's one or the other.'"—St. Louis Globe-Democrat.

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"You need not think you can make a fool of me," the witness bellowed at the lawyer.

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A Sad Mistake. When the talk turned to domestic felicity this story was told by Congressman Stanley E. Bowdle, of Ohio:

Recently a colored party living in the suburbs of a big city married a large brunette named Lucinda. Three weeks later he appeared at the office of a lawyer, looking as if he might have been dented with flatirons and bumped into by a road roller.

"Can't stand it no longer, boss," he sadly remarked to the legal one. "I wants a divawce from dat Lucinda. Las' ting she chucked at me was de stove. To-morrer it will be de chimbley."

"That's all right, Sam," soothingly returned the lawyer, seeking to effect a reconciliation. "Everything will come out all right. Besides, you know you took Lucinda for better or for worse."

"Yes, sah," admitted Sambo. "So I did, sah, but she is a whole lot wuss dan I took her for."—Philadelphia Telegraph.

An Amendment. Down in Texas "before the War" an Episcopal missionary living out on the plains was aroused one night by a likely looking negro man and maid who asked the preacher to marry them.

The missionary's wife and a guest were impressed to act as witnesses, and the ceremony began and proceeded as usual until that part or portion of the service where the groom was asked if he took this woman "for better or for worse."

At this question the groom replied loudly, "Nossuh! I takes her for to cook and for wash."—Judge.

Couldn't Escape. With pathetic tears on her baby cheeks, little Ethel ran up to the big, stalwart policeman.

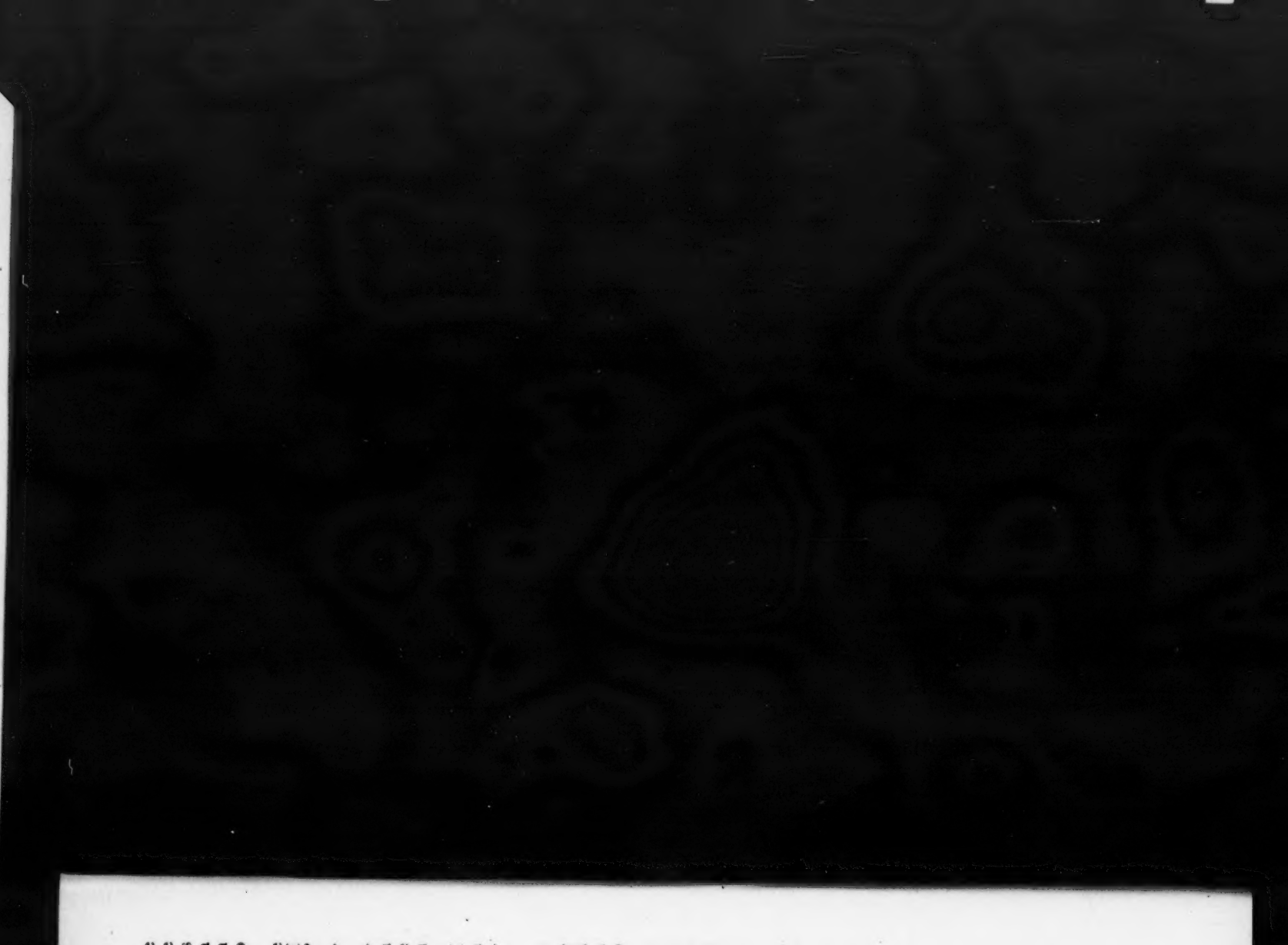
"P-p-please, sir," she sobbed, "will you come and lock a bad man up?"

"What's he been doing?" asked the man in blue gently.

"Oo—boo—boo," wailed Ethel, "he's b-b-broken up my hoop wif 'is nasty bicycle."

"Has he?" replied the bobby angrily, as he saw her tears flow afresh. "Where is he?"

"Oh, you'll easily catch 'im," said Ethel, drying her tears. "They've just carried 'im into that chemist's shop on a shutter!"—Argonaut.



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"What's he been doing?" asked the man in blue gently.

"Oo—boo—boo," wailed Ethel, "he's b-b-broken up my hoop wif 'is nasty bicycle."

"Has he?" replied the bobby angrily, as he saw her tears flow afresh. "Where is he?"

"Oh, you'll easily catch 'im," said Ethel, drying her tears. "They've just carried 'im into that chemist's shop on a shutter!"—Argonaut.